the statement in D4 'on behalf of Defotanghe Shipping Co Ltd', he said he was not aware what it was all about. He said that as far as he was concerned, he was buying from Lim Ho Sai Trading & Transport Co. He even denied any knowledge that he was buying the rice at about 60% of the market price. He claimed that he was told by a business friend in Hong Kong that the market price was $500 to $600 per metric ton.

Section 21 (1) of the Sale of Goods Act 1979 provides that, subject to the Act, where goods are sold by a person who is not their owner and who does not sell them under the authority or with consent of the owner, the buyer acquires no better title to the goods than the seller had. The exceptions relevant for present purposes are (a) in the case of a sale in market overt as provided under s 22 of the Act; (b) sale by a mercantile agent as provided under s 21(2) of the Act and s 2(1) of the Factors Act 1889; and (c) the doctrine of estoppel which arises if '... the owner of the goods is by his conduct precluded from denying the seller's authority to sell': see s 21(1) of the Act.

In my judgment, the plaintiffs have successfully shown that the defendants were not acting in good faith and without notice that the sale to them was made without the owner's authority. They were buying at about half the market price and I find the evidence of Lim You Chong about his knowledge of the market price very unsatisfactory. He was obviously not keeping to the truth. I am sure he knew he was getting the rice on the cheap, that the circumstances were highly suspicious and I think he took a calculated risk, hoping to make an unusual amount of profit within a very short time. I am satisfied that the defendants did not buy from the market overt. It is also quite plain that the charterers were carriers and were not 'mercantile agents'. The third exception also does not arise as there was no evidence that the owners of the rice had done anything or failed to do anything that would raise an estoppel under s 21(1) of the Act.

On the evidence, I am satisfied that the plaintiffs were the pledgees or holders for value of the bills of lading and that they were entitled to possession of the goods; that they had not been reimbursed by the original Somalian buyers; and that the defendants had wrongfully withheld possession of the rice from them.

The damages claimed were proved and were not disputed. The defendants are ordered to pay the plaintiffs the sum of $79,639.85 and interest thereon at 12% pa calculated from 1 August 1979 and the costs of these proceedings. The said guarantee and all renewals thereof in favour of the defendants are also discharged.

Order accordingly.

Solicitors: *Godwin & Co*; *Lim Kiap Khee & Co.*

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor

HIGH COURT (PENANG) – CIVIL SUIT NO 375 OF 1981
EDGAR JOSEPH JR J
12 JANUARY 1989

Tort – Trespass – Nuisance – Implied easement – Construction of deeds where terms not clear – Proprietary estoppel – Words or conduct may raise an equity – Role of equity under the National Land Code 1965

Statutory Interpretation – Scope of s 6 of the Civil Law Act 1956 – Availability of other remedies where specific performance not available due to hardship – Measure of damages for trespass, nuisance and injury to land – Implied terms

Damages – Principles governing award and assessment of general, special and exemplary damages – Definition and scope of laches, acquiescence, abandonment, waiver and limitation – Benefit and burden of a contract

Civil Procedure – Limitation – Whether Limitation Act can give way to estoppel

The material facts of this case are that by a sale and purchase agreement in writing dated 12 July 1971 ('the agreement') expressed to be 'binding upon the heirs, assigns and personal representatives of the parties', the plaintiffs as the trustees of the will and trusts of the estate of the deceased Templeton had agreed to sell five plots of land known as holding nos 63(1) (later renumbered as lot 394), 64(1) (later renumbered as lot 39), 78(1), 78(2) and 80 to one Dato Low Yow Chuan, the managing director and alter ego of the first defendant, a development company. The second defendant is the contractor of the first defendant. However, the plaintiffs retained for themselves three other neighbouring plots, now known as lots 48, 55 and 56, the first two of which were the subject matter of this suit. By cl 11 of the agreement, it was provided as follows:

'This sale is sold subject to the right of way to owners of neighbouring holdings to and from their land on the existing road and also from holding 64(10) (now known as lot 48), Mukim 17, North East District, Penang.'

Unfortunately, there was nothing in the agreement defining 'the right of way', 'the neighbouring holdings' or the 'existing road' nor was any plan or sketch annexed thereto to define the nature and extent of the grant concerned.

Although the agreement was silent as to the question of the execution and registration of the forms prescribed under the National Land Code 1965 ('the Code') for the creation of an easement of way, the first plaintiff said that he came to know, sometime after the completion of the sale, as to the necessity for these requirements. So he asked for the same informally, though he was not able to recall to whom he spoke. However, the first defendant did not execute the forms prescribed under the Code for the creation of an easement of way and when, sometime in January 1980, the first plaintiff came to know that the first defendant was ready to commence earthworks on lot 39 (the major lot) pursuant to plans they had submitted, he wrote a letter dated 16 January 1980 (exh P2) to Dato Low Yow Chuan, its managing director, reminding him about cl 11 of the agreement and also that their development plans had not allowed for the right of way on the existing road, but this evoked no response. But at a meeting in February 1980 between the first

plaintiff and the managing director and alter ego of the first defendant, the latter 'had more or less agreed that the existing road would be left as agreed upon under cl 11'.

The first plaintiff then asked the managing director for confirmation in writing of the verbal assurance he had given at this meeting but none was forthcoming. The first plaintiff then consulted his solicitors who then wrote to the managing director of the first defendant by a letter dated 8 April 1980 asking for confirmation as to whether or not a right of way was to be provided in accordance with the agreement. This letter also evoked no response. In the meanwhile, the first defendant had by agreements dated 8 April 1980 and 8 October 1980 agreed to sell dwelling houses built upon portions of land situated on the existing road to third parties.

In April 1981, during a site visit, the first plaintiff saw that his family house which stood on lot 48 was being buried by reason of the earthworks being carried out by the second defendant, as contractors for the first defendant on the condominium scheme on lot 39 and also that the construction works carried out were hindering access from the plaintiffs' lots to the public highway.

The first plaintiff then sought the intervention of the first defendant's solicitors who had taken part in the negotiations leading to the sale of the lots concerned to the first defendant and who had also prepared the agreement. Accordingly, the solicitors by a letter dated 29 July 1981 wrote to the first defendant's managing director and stated that the road leading to the plaintiffs' family house on lot 48 and to lot 55 had been cut off by the first defendant's development and reminding him that the sale of the five lots concerned had been expressly conditional upon the previous owners having the right to exercise the right of way over the existing road. It was stressed that without this condition the plaintiffs would not have sold the lots concerned to the first defendant.

Once again there was no reply to this letter whereupon the plaintiffs consulted their solicitors who by separate letters dated 7 July 1981 addressed to the defendants repeated their grievances and called upon them to cease further trespass and nuisance, to clear the existing excavated material and to ensure that the right of way was secured. Having received no replies to these and further letters dated 1 August 1981 and 19 September 1981, the plaintiffs' solicitors caused to be issued the writ of summons herein on 26 September 1981.

Broadly and summarily stated, the plaintiffs' claims were for general damages for trespass, nuisance and injury to their two plots of land allegedly caused by the development activities of the first defendant and its contractor the second defendant, on neighbouring land, resulting in obstruction of access from the plaintiffs' lots to the public highway. The plaintiffs further claimed (a) exemplary and aggravated damages, (b) specific performance of the contractual right of way in order to obtain for themselves a right of carriageway as aforesaid and an injunction in aid thereof. Alternatively, the plaintiffs claimed a declaration that they were entitled to an equitable easement in respect of this right of carriageway.

The defendants denied the allegations of trespass and nuisance and relied on inevitable accident and the plea of abatement of nuisance. So far as the claim for specific performance was concerned, the defendants contended that the plaintiffs' claims were barred by abandonment, acquiescence, delay, waiver and limitation.

Held, allowing the claims of the plaintiffs:

(1) The plaintiffs succeeded in establishing liability in tort against both the defendants, in so far as the claims for general damages for trespass, nuisance and injury to lots 48 and 55 were concerned, resulting in obstruction of access therefrom to the public highway known as the Batu Ferringhi Road.

(2) As for the plaintiffs' claims in contract, cl 11 did not define the expressions 'neighbouring holdings', or 'the existing road'; accordingly, those expressions had to be construed in the light of the surrounding circumstances. So construed, the court found as a fact that the expression 'neighbouring holdings' meant the holdings which included lots 48, 55 and 56, still owned by the plaintiffs, while the expression 'existing road' meant the existing road evidenced by the 1935 Survey Department map which had two branches whose combined width was 30 ft.

(3) The court further found as a fact that for purposes of s 282 (3) of the Code the dominant lands were lots 48, 55 and 56, whilst the servient land was lot 39, one of the five plots of land purchased by the defendant company from the plaintiffs and upon which the defendant company carried out their development works for the construction of a condominium block.

(4) Although cl 11 did not expressly provide for the creation of a right of carriageway under the provisions of s 286(1) and s 288(b) of the Code, the court found that it was necessary for such a term to be implied for otherwise the plaintiffs' lots would be rendered sterile and landlocked. The first defendant was thus under a contractual obligation to execute a valid and registrable easement in due form for the creation of a right of carriageway in perpetuity.

(5) The court further found that although the first defendant had been in breach of cl 11, it was not disposed to granting an order for specific performance thereof since to do so would occasion great hardship to the first defendant because it would involve the demolition of three dwelling houses in a block of eight link houses standing on the right of carriageway concerned leading to lot 48 and which the first defendant had built and sold to innocent third parties, not to mention problems with the planning authority. Instead, the court being satisfied, having regard to the conduct and relationship of the parties, that an equity had arisen in favour of the plaintiffs, the appropriate relief to satisfy that equity would be to make an order analogous to an order for specific performance against the first defendant, namely, subject to planning permission being obtained, a mandatory injunction requiring the first defendant to construct, as soon as reasonably possible, a single metalled access road 12 ft wide, in accordance with the plan D75 which it had offered to construct at the trial, thus affording access from lot 48 to the public highway. To give legal effect to this order, the first defendant was further required to execute the prescribed Form 17A under s 286(1) of the Code for the creation of an easement of way, in particular, a right of carriageway within the meaning of s 288(b) of the Code in perpetuity.

(6) However, in the event of the rights of third parties having intervened, or if there is some legal or other impediment to the creation of such an easement, the parties shall be at liberty to apply to court to enable it to consider what further or other orders it should make in substitution therefor, including an order for the award of damages for diminution in value of lot 55, having regard to the circumstances.

(7) The plaintiffs having obtained only a modified form of an order for specific performance as aforesaid, instead of an order for specific performance for the grant of a right of way as envisaged in cl 11, it was entitled to general damages for diminution in value of lot 48. More particularly, instead of an access consisting of two branches with a combined width of 30 ft envisaged in cl 11, they will now have to be content with a single access 12 ft wide as evidenced by the plan D75. Such damages fell to be assessed on the basis of the sum of money which the first defendant would have been prepared to pay to

gain substantial release from the obligation of performing the covenant for the provision of the right of way envisaged in cl 11. Accordingly, the court awarded the plaintiffs $100,000 for the diminution in value of lot 48.

(8) The plaintiffs were also entitled to a sum by way of fair rent for the use by the defendants of lot 48 for the storage of building materials and equipment and, as a working platform, for its development works on its condominium block on lot 39 at $500 pm for the period of ten months from February to November 1981, thus amounting to $5,000, even though there was no evidence that the plaintiffs had intended to put their land to any particular use during that period. Accordingly, the court made an award of $5,000 under this head against both the defendants.

(9) As for the plaintiffs' claim for destruction of the family house which stood on lot 48, the evidence disclosed that it had been virtually abandoned for more than 20 years at the time of the acts of trespass complained of and that the plaintiffs never had the intention of restoring it nor was the court satisfied that they would do so in the event of an award being made by the court under this head. Accordingly no award was made under this head.

(10) As for the plaintiffs' claims for exemplary damages, in respect of lot 48, the conduct of the defendants was such as to entitle the plaintiffs to an award of $25,000 and the court made an award accordingly under this head.

(11) As for the plaintiffs' claims for diminution in value of lot 55, this was founded on the defendants' acts of trespass by constructing six dwelling houses on the existing road leading to lot 55, thus obstructing access thereto and also by the defendants' acts of trespass in using lot 55 as a dumping ground and a working platform for the construction of the condominium block on lot 39.

(12) So far as the problem of lack of access to lot 55 was concerned, the court found that access therefrom by the existing road evidenced in the 1935 Survey Department map to the public highway was not feasible due to the presence of six houses constructed by the first defendant and already sold to innocent third parties. But the court found that a suitable alternative form of access was that offered by the first defendant at the hearing, namely, a 40 ft wide access within its own development on lot 39.

(13) In these circumstances, having regard to the conduct and relationship of the parties, an equity had arisen in favour of the plaintiffs, and the appropriate reliefs to satisfy it would be to make orders analogous to specific performance requiring the first defendant to execute the prescribed Form 17A under s 286(1) of the Code thus creating a right of carriageway under s 288(b) of the Code in perpetuity over its 40 ft wide main access road on lot 39 (the servient land) and so affording access from lot 55 (the dominant land) to the public highway provided this order did not have the effect of interfering with the rights of third parties which might have intervened. Accordingly, no award would be made for damages on account of lot 55 being landlocked.

(14) However, if the rights of third parties had intervened, or if there was some legal or other impediment to the creation of a right of carriageway as aforesaid, then the parties were at liberty to apply to court to enable it to consider what further or other orders should be made in substitution therefor, including, perhaps, an order for the award of damages for diminution in value to lot 55, having regard to the circumstances.

(15) As for the plaintiffs' claim for damages for trespass to lot 55 in using it as a dumping ground and a working platform the court made an order for a mandatory injunction directed at the defendants to restore it to its natural state.

(16) The court further found that as the plaintiffs had no intention of developing lot 55, no award would be made for the cost of construction of a retaining wall to protect the said lot from soil erosion.

(17) As for the plaintiffs' claims for use by the defendants of lot 55 for the storage of building materials, a working platform and a rear access the court found that the defendants had so used the lot for a period of 20 months ending in March 1983, and so awarded the plaintiffs a sum of $600 pm thus amounting to $12,000.

(18) As for the plaintiffs' claims for exemplary damages in respect of lot 55, the defendants having saved two to three months by using the lot as an access to their condominium block on lot 39 at the expense of the plaintiffs' rights and in view of the defendants' conduct generally, the court made an award of $50,000.

(19) Having regard to the circumstances of the case and, in particular, the conduct of the parties, the defence of laches, acquiescence, abandonment and waiver must fail.

(20) The court further found that the plaintiffs' claims were not statute-barred under s 6(6) of the Limitation Act 1953, as the plaintiffs had by virtue of cl 11 acquired a benefit of a covenant restricting the use of the adjoining plots. In any event, the plaintiffs' cause of action arose only when the acts of obstruction occurred in mid-1981 and not on the date of execution of the agreement. Further, the plaintiffs had acquired a beneficial interest in an equitable easement under the doctrine of constructive trust which would be protected in perpetuity and s 22(1)(b) of the Limitation Act 1953 excludes the defence of limitation where there has been conversion of trust property, as in this case.

(21) In any event, the court found that the first defendant having taken the benefit of the transaction concerned is estopped from repudiating the burden imposed on it by cl 11 of the agreement.

(22) Finally, the court ruled that one can estop oneself out of the Limitation Act by conduct and that upon the facts found the first defendant had done so. Alternatively, if the first defendant had not done so, upon the facts found, the first defendant had in 1980 acknowledged the plaintiffs' right or title to the right of way claimed and as the writ herein was issued on 29 June 1981 the defence of limitation failed.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 504 of 1988.]

Cases referred to

1 *Johnstone* v *Holdway* [1963] 1 QB 601 (refd)
2 *The Shannon Ltd* v *Venner Ltd* [1965] 1 Ch 682 (refd)
3 *The Moorcock* (1889) 14 PD 64 (refd)
4 *Shirlaw* v *Southern Foundries Ltd* [1939] 2 KB 206 (refd)
5 *Wettern Electric Ltd* v *Welsh Development Agency* [1983] 2 WLR 897 (refd)
6 *Howman & Sons* v *Blth* [1983] ICR 416 (refd)
7 *Fraser & Ors* v *Thames Television Ltd & Ors* [1983] 2 All ER 101 (refd)
8 *Liverpool City Council* v *Irwin* [1976] 2 All ER 39 (HL) (refd)
9 *Datin Siti Hajjah* v *Murugasu* [1970] 2 MLJ 153 (refd)

10 *Crabb* v *Arun DC* [1975] 3 All ER 865 (refd)
11 *Ramsden* v *Dyson* (1866) LR 1 HL 129 (refd)
12 *Birmingham & District Land Co* v *London & North Western Railway* (1888) 40 Ch D 268 (refd)
13 *Plimmer* v *Wellington Corporation* (1884) 9 App Cas 699 (refd)
14 *Inwards* v *Baker* [1965] 2 QB 29 (refd)
15 *Ives (ER) Investments Ltd* v *High* [1967] 1 All ER 504 (refd)
16 *Bhagwan Singh* v *Hock Hin Bros* [1967] 1 MLJ 324 (refd)
17 *Abigail* v *Lapin* [1934] AC 491 (refd)
18 *Butler* v *Fairclough* (1916-17) 23 CLR 78 (refd)
19 *Vallipuram Sivaguru* v *PCRM Palaniappa Chetty & Anor* [1937] MLJ 59 (refd)
20 *United Malayan Banking Corporation Berhad* v *Goh Tuan Laye & Anor* [1976] 1 MLJ 169 (refd)
21 *Wilkins* v *Kannammal* [1951] MLJ 99 (refd)
22 *Valliappa* v *Kesarmal* [1951] MLJ 117 (refd)
23 *Oh Hiam & Ors* v *Tham Kong* [1980] 2 MLJ 159 (refd)
24 *Karuppiah Chettiar* v *Subramaniam* [1971] 2 MLJ 116 (refd)
25 *Devi* v *Francis* [1969]2 MLJ 169 (refd)
26 *Woo Yok Wan* v *Loo Pek Chee* [1975] 1 MLJ 156 (refd)
27 *Yong Tong Hong* v *Siew Soon Wah & Ors* [1971] 2 MLJ 105; [1973] 1 MLJ 133 (refd)
28 *Bank Negara Indonesia* v *Philip Hoalim* [1973] 2 MLJ 3 (refd)
29 *Thomas* v *Dering* [1837] 1 Keen 729; 48 ER 488 (refd)
30 *Hexter* v *Pearce* [1900] 1 Ch 341 (refd)
31 *Duke of Beaufort* v *Patrick* (1853) 17 Beav 60; 51 ER 954 (refd)
32 *Dillwyn* v *Llewelyn* [1862] 4 De GF & J 517; 45 ER 1285 (refd)
33 *Thomas* v *Thomas* [1956] NZLR 785 (refd)
34 *Pascoe* v *Turner* [1979] 1 WLR 431 (refd)
35 *Livingstone* v *Rawyards Coal Co* (1880) 5 App Cas 25 (refd)
36 *Munnelly* v *Calcon* [1978] IR 387 (refd)
37 *Bracewell* v *Appleby* [1975] Ch 408 (refd)
38 *Carr-Saunders* v *Dick McNeil Associates* [1986] 1 WLR 922 (refd)
39 *Wrotham Park Estate Co* v *Parkside Homes* [1974] 1 WLR 798 (refd)
40 *Chaplin* v *Hicks* [1911] 2 KB 786 (CA) (refd)
41 *Fernando* v *Indrarajah* [1987] 2 CLJ 365 (refd)
42 *Penarth Dock Engineering Co* v *Pounds* [1963] 1 Lloyd's Rep 359 (refd)
43 *Martin* v *Porter* [1839] 5 M & W 351; 151 ER 149 (refd)
44 *Hilton* v *Woods* (1867) LR 4 Eq 432 (refd)
45 *Jegon* v *Vivian* (1871) 6 Ch App 742 (refd)
46 *Whitwham* v *Westminster Brymbo Coal Co* [1896] 2 Ch 538 (CA) (refd)
47 *Hole & Son (Sayers Common)* v *Harrisons of Thurnscoe* [1973] 1 Lloyd's Rep 345 (refd)
48 *Taylor (Wholesale)* v *Hepworths* [1977] 1 WLR 659 (refd)
49 *Rookes* v *Barnard* [1964] AC 1129 (refd)
50 *Cassell & Co* v *Broome* [1972] AC 1027 (HL) (refd)
51 *Broome* v *Cassell & Co* [1971] 2 QB 354 (refd)
52 *Drane* v *Evangelou* [1978] 1 WLR 455 (CA) (refd)
53 *Australian Consolidated Press* v *Uren* (1966) 40 ALJR 142 (refd)
54 *Kenny* v *Preen* [1963] 1 QB 499 (CA) (refd)
55 *Holden* v *Chief Constable of Lancashire* [1987] QB 380 (CA) (refd)
56 *Praed* v *Graham* (1889) 24 QBD 53 (CA) (refd)
57 *Basely* v *Clarkson* 83 ER 565 (refd)
58 *Burroughes* v *Abbott* [1922] 1 Ch 86 (refd)
59 *Weld* v *Petrie* [1929] 1 Ch 33 (refd)
60 *Pickering* v *Lord Stamford* (1795) 30 ER 787 (refd)
61 *Fitzgerald* v *Masters* (1956) 95 CLR 420 (refd)
62 *Bester* v *Perpetual Trustee & Co Ltd* (1970) 33 NSWR 30 (refd)
63 *Fullwood* v *Fullwood* (1878) 9 Ch D 176 (refd)
64 *Re Jarvis* [1958] 2 All ER 336 (refd)
65 *Lindsay Petroleum Co* v *Hurd & Ors* (1874) LR 5 PC 221 (refd)
66 *Duke of Leeds* v *Earl of Amherst* 41 ER 886 (refd)
67 *Glasson* v *Fuller* [1922] SABL 148 (refd)
68 *Archbold* v *Scully* [1861] 9 HCL 360; 11 ER 769 (refd)
69 *Cashman* v 7 *North Golden Gate Mining Co* [1897] 7 QLJ 152 (refd)
70 *Swan* v *Sinclair* [1924] 1 Ch 254 (refd)
71 *Tehidy Minerals Ltd* v *Norman & Ors* [1971] 2 QB 528 (refd)
72 *Sargent* v *ASL Developments Ltd* (1974) 131 CLR 634 (refd)
73 *Ross T Smyth* v *TD Bailey & Son* [1940] 3 All ER 60 (refd)
74 *Beatty* v *Guggenheim* (1919) 122 NE 378 (refd)
75 *Tam Kam Cheong* v *Stephen Leong Kon Sang & Anor* [1980] 1 MLJ 36 (refd)
76 *Lysaght* v *Edwards* (1876) 2 Ch D 499 (refd)
77 *Temenggong Securities Ltd* v *Registrar of Titles, Johore* [1974] 2 MLJ 45 (refd)
78 *Ong Chat Pang* v *Valliappa Chettiar* [1971] 1 MLJ 224 (refd)
79 *Binions* v *Evans* [1972] Ch 359 (refd)
80 *Brikom Investments* v *Carr* [1979] QB 467 (refd)
81 *Radford* v *De Frobervillle* [1977] 1 WLR 1262 (refd)
82 *Halsall* v *Brizell* [1957] Ch 169 (refd)
83 *Tito* v *Waddell (No 2)* [1977] Ch 106 (refd)
84 *Hopgood* v *Brown* [1955] 1 All ER 550 (refd)
85 *Combe* v *Combe* [1951] 2 KB 215 (refd)
86 *Amalgamated Investment and Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] QB 84 (folld)
87 *Kok Hoong* v *Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ 49 (refd)
88 *Turburville* v *West Ham Corporation* [1950] 2 KB 208 (refd)
89 *Othman & Anor* v *Mek* [1972] 2 MLJ 158 (refd)
90 *Mitchell* v *Harris Engineering Co Ltd* [1967] 2 QB 703 (CA) (refd)
91 *Edginton* v *Clark* [1964] 1 QB 367 (refd)

Legislation referred to
Civil Law Act 1956 s 6
Limitation Act 1953 ss 6(6), 22(1)(b)
National Land Code 1965 ss 282(3), 286(1), 288(b)

Gan Teik Chee for the plaintiffs.
NT Vello (*P Navaratnam* with him) for the defendants.

Cur Adv Vult

Edgar Joseph Jr J: This case concerns a dispute between neighbours about acts of alleged trespass and nuisance to land and also about an alleged contractual right of way and, as might be expected of such a dispute, it generated a considerable degree of acrimony ending in a long drawn-out, complex and expensive law suit.

Before me, the plaintiffs' claims, stated broadly and summarily, were for general damages for trespass, nuisance and injury to their two plots of land allegedly caused by the development activities of the first defendant Low Yat Holdings Sdn Bhd, since 6 June 1983 renamed Mount Pleasure Corporation Sdn Bhd and

amended accordingly ('the defendant company'), and its contractor the second defendant, on neighbouring land, resulting in obstruction of access from these lots to the public highway.

The plaintiffs further claimed (1) exemplary and aggravated damages, (2) specific performance of the contractual right of way in order to obtain for themselves a right of carriageway as aforesaid and an injunction in aid thereof. Alternatively, the plaintiffs claimed a declaration that they were entitled to an equitable easement in respect of this right of carriageway.

The defendants denied the allegations of trespass and nuisance and relied on inevitable accident and the plea of abatement of nuisance. So far as the claim for specific performance was concerned, the defendants contended that the plaintiffs' claims were barred by abandonment, acquiescence, delay, waiver and limitation.

The material facts, being somewhat complicated, I shall begin at the beginning, by mentioning by way of background, certain introductory facts.

In 1958, one TV Templeton died and left surviving him three children – a son Alfred Templeton, and two daughters, Rita and Phyllis Templeton – the three plaintiffs herein, respectively. He also left amongst his assets eight lots of land situated in Batu Ferringhi, to which the three plaintiffs succeeded. On one of these – lot 48 (previously known as lot 64 (10)) – stood the family house which was to figure prominently at the trial.

During his lifetime, the deceased Templeton sold some other lots adjoining the eight lots, from time to time; they appear as lots 49 to 54 in the plan, being p 49 of the agreed bundle ('AB'), which depicts an area known as Mount Pleasure – so named by the deceased. The plan also depicts what the first plaintiff Alfred Templeton has described as 'the roadway' or 'the old road', subsequently referred to as 'the existing road', being the area shaded or dotted therein which was also to figure prominently at the trial.

According to the first plaintiff, when the deceased Templeton subdivided the Mount Pleasure property, he provided for a roadway to service all the subdivided lots including the lots sold and, indeed, he had had 'an understanding' with the purchasers thereof to that effect. The first plaintiff added that some of the lots sold fronted the main Batu Ferringhi Road and so had to have a rear access road.

Sometime after the death of the deceased – it was not in evidence when this was – the first and the second plaintiffs emigrated to Perth, Australia whilst the third plaintiff remained and still remains in this country. As for the family house, the first plaintiff himself testified that 'it had been vacant since 1960 and in time had been vandalised and by 1980 had become a very run-down house'.

Be that as it may, the history of events which called for the consideration of the court begins with a sale and purchase agreement in writing, dated 12 July 1971 ('the sale and purchase agreement') expressed to be 'binding upon the heirs, assigns and personal representatives of the parties' whereby the plaintiffs as the trustees of the Will Trusts of the estate of the deceased Templeton had agreed to sell five plots of land known as holding nos 63(1) (later renumbered as lot 394), 64(1) (later renumbered as lot 39), 78(1), 78(2) and 80 to one Dato Low Yow Chuan, the managing director and alter ego of the defendant company. However, the plaintiffs retained for themselves three other neighbouring plots, now known as lots 48, 55 and 56, the first two of which are the subject matter of this suit.

By cl 11 of the sale and purchase agreement, it was provided as follows:

> This sale is sold subject to the right of way to owners of neighbouring holdings to and from their land on the existing road and also from holding 64(10) (now known as lot 48) Mukim 17, North East District, Penang.

Unfortunately, there was nothing in the sale and purchase agreement defining 'the right of way', 'the neighbouring holdings' or the 'existing road' nor, for that matter, was any plan or sketch annexed thereto to define the nature and extent of the grant concerned. In the result, there was a considerable dispute at the hearing as to the meaning and effect of this clause not to mention the legal issues to which it gave rise as will appear later on in this judgment.

I would, at this stage, interpolate to mention that in order to elucidate the factual issues which arise for decision, I shall be reproducing certain crucial contemporary documents, especially the correspondence in the case, showing what they say.

I must now resume the narrative of events which ended in the dispute, the subject of this action.

Pursuant to the sale and purchase agreement, the plaintiffs executed in favour of the defendant company a transfer of the lots hereinbefore mentioned and this was duly registered on 19 September 1971. Although the sale and purchase agreement was silent as to the question of the execution and registration of the forms prescribed under the National Land Code 1965 ('the Code') for the creation of an easement of way, the first plaintiff said that he came to know, sometime after the completion of the sale, as to the necessity for these requirements, so he asked for the same informally, though he was not able to recall to whom he spoke.

However, the defendant company did not execute the forms prescribed under the Code for the creation of an easement of way and when, sometime in January 1980, the first plaintiff came to know that the defendant company was ready to commence earthworks on lot 39 (the major lot) pursuant to plans they had submitted, he

wrote a letter dated 16 January 1980 (exh P2) to Dato Low Yow Chuan, its managing director, reminding him about cl 11 of the sale and purchase agreement but this evoked no response.

That letter was in the following terms:

> 16 January 1980
>
> Mr Low Yow Chuan,
> c/o Low Yat Holdings Sdn Bhd,
> Federal Hotel,
> Jalan Bukit Bintang,
> Kuala Lumpur,
> Malaysia.
>
> Dear Sir,
>
> It has been brought to my notice that you have made plans to develop sections of land purchased from my family in 1971. However, I am led to believe that plans being drawn up have not allowed for the right of way on the existing access road.
>
> Due to the nature of this information, it would only be fair to remind you that before any plans are implemented you should check your purchase agreement under cl 11 dated 12 July 1971.
>
> I will be going to Penang in the very near future to look into the matter and will contact you personally at a later date.
>
> Yours faithfully,
> sgd
> (A Templeton)

So, in February 1980, the first plaintiff flew from Perth to Kuala Lumpur and met Dato Low at the Federal Hotel (where the latter had his private office) and raised the matter of the impending earthworks, especially about the provision of a right of way on 'the existing road'. But, instead of addressing the issue raised, Dato Low said that as the lots still owned by the plaintiffs were small, he offered to buy them. In the words of the first plaintiff, Dato Low said, 'Why worry, I will buy you out.' But the first plaintiff replied that the lots concerned were not for sale, that he and the other plaintiffs wished to keep them for sentimental reasons and also because the family house stood on one of those lots.

The first plaintiff also mentioned to Dato Low that he had seen the defendant company's development plans and that these did not show the existing road. In point of fact, however, the first plaintiff had not seen those plans though he had been informed about them. Dato Low then suggested that the first plaintiff should see the defendant company's project manager, Mr Chan (PW 2), at the defendant company's offices at Ipoh Road, Kuala Lumpur the next day. The first plaintiff did so.

At this meeting, at which Dato Low was also present, the first plaintiff expressed his concern saying that although the defendant company's original development plans had allowed for an existing road the subsequent plans did not. Once again, Dato Low offered to buy out the plaintiffs but the first plaintiff replied that the remaining lots were not for sale. Upon the first plaintiff insisting on the existing road, both Dato Low and Mr Chan said that arrangements would be made for an alternative access to lot 48 on which the family house stood. But the first plaintiff insisted on compliance with cl 11 of the sale and purchase agreement. Whereupon, Dato Low said, in a joking manner, that the first plaintiff should be more concerned with getting access to lot 48 only and not be too concerned about access to the other lots.

Upon returning to Australia, the first plaintiff took the wise precaution of writing a letter dated 1 March 1980 (exh P3) to Dato Low, wherein he confirmed the discussions at the meetings aforesaid and which was in the following terms:

> 1 March 1980
>
> Mr Low Yow Chuan,
> c/o Low Yat Holdings Sdn Bhd,
> 468-6E Jalan Ipoh,
> Kuala Lumpur 13-04,
> Malaysia
>
> Dear Yow Chuan,
>
> After our meeting last week at the Federal Hotel and again at your office in the company of your project manager Mr Chan Peng Fook, I would appreciate your assurances by confirming per return mail that the existing access road will be left as agreed upon under cl 11 in the purchase agreement of July 1971.
>
> With regard to your offer to purchase the other lots of land, once again I must stress that at present I am not selling. As mentioned during our meeting, these lots were not included with the balance of land sold to you in 1971 because it is the intention of my family to at least retain some property in Penang and at a later date restore our old homestead at lot 48, and perhaps develop the other two lots with help from friends. It is my intention to one day retire to our home in Penang.
>
> Yours sincerely,
> sgd

I find that this letter contains an accurate account of what transpired at the meetings concerned, that Dato Low did receive it, but did not reply thereto. Similarly, the first plaintiff also wrote a letter dated 1 March 1980 (exh P4) to Mr Chan which was in the following terms:

> 1 March 1980
>
> Mr Chan Peng Fook,
> c/o Low Yat Holdings Sdn Bhd,
> 468-6E Jalan Ipoh,
> Kuala Lumpur 13-04,
> Malaysia
>
> Dear Mr Chan,
>
> I am writing under separate cover to Yow Chuan to ask him to confirm that the existing access road will be left as agreed upon.
>
> Although Yow Chuan has more or less agreed to leave the access road as it is, I would appreciate if you could write to me as soon as possible to confirm that he has not in any way changed his mind.

As the project manager, you are no doubt aware that if Yow Chuan insists on going through with the development and uses his plan he would have breached the agreement of sale and I do not have to remind you of the seriousness of his actions.

Your early reply would be appreciated.

Yours sincerely
sgd

Indeed, Mr Chan, who was called by the plaintiffs, confirmed the accuracy of the contents of the letter P4. Other parts in the evidence of Mr Chan which merit reference are as follows. On his discussions with Dato Low regarding the contents of the letter P4, Mr Chan said:

I told Dato Low that we had to relate PW1's request to the lay out plan. I explained that there would be a 20 ft right of way to PW1's property – by that I meant it was possible to provide a 20 ft right of way. Dato Low agreed with this – I mean he agreed with this proposal. This right of way would be situated at the rear of the link houses overlooking the sea (shown AB p 49) – yes, I can indicate the proposed right of way on this plan (marks it with a red ball pen). Yes, this was the proposed right of way I had in mind when I spoke to Dato Low. He agreed with this. Yes, he had the plan before us when we discussed this – so he knew its implication. No steps were taken to carry out this proposal while I was employed there.

On P3, the first plaintiff's letter to Dato Low, Mr Chan said that although Dato Low did not show it to him, he recalled that when he saw the first plaintiff in February 1980 at the defendant company's office, the first plaintiff had given him an account of what had transpired at the meeting between him (the first plaintiff) and Dato Low the day before. Mr Chan's version of what the first plaintiff told him on this occasion was wholly consistent with that of the letter P3.

Speaking about the original lay out plans submitted by the defendant company, Mr Chan said this:

Yes, the original lay out plan submitted by defendant company did provide for a 20 ft right of way or back lane which would run alongside the common boundary with lot 39, (ie the Mount Pleasure property owned by the defendant company) from the adjacent lots belonging to the plaintiffs and others. This right of way corresponded with my own proposal. Actually, the right of way was already provided for in the original lay out plan submitted by the defendant company and approved – this was long before I made my proposal to Dato Low.

Speaking about the amended lay-out plan, Mr Chan said this:

... I did make a suggestion of my own as to this right of way and this I would like to illustrate by marking in red on the plan p 19, AB. This suggestion of mine was in fact not new as it was incorporated in the original lay out plan. However, I made it because defendant company were proposing to submit an amended lay out plan which provided not a right of way but a drainage reserve and footpath about five ft wide. The width of the right of way proposed by me was 20 ft. Up to the time I left the services of defendant company my proposal about the right of way although accepted by defendant company had not been implemented. I do not know why this was so.

On the position of Dato Low as the brain or alter ego of the defendant company, Mr Chan said this:

The practice of the defendant company was that *all* decisions on *all* matters including technical ones were made by Dato Low personally. I went along with this practice. (Emphasis supplied).

On why he left the services of the defendant company after having served it in the capacity of project manager for 11 years ending on 1 November 1980, Mr Chan said this:

Yes, I finally left the services of the defendant company for greener pastures – not because of working conditions.

Under cross-examination, Mr Chan said that his proposal was to restore the 20 ft right of way only up to lot 48 in order to comply with the first plaintiff's request. And cross-examined on his proposal for a 20 ft right of way, he said this:

Shown AB p 50 – having seen this plan, more particularly, portion marked red, I say it is not possible to get a road reserve uniformly 20 ft wide, unless part of the newly-subdivided lot is used for this purpose.

Now, as I have already said, the first plaintiff got no reply to his two letters dated 1 March 1980 addressed separately to Dato Low and Mr Chan. So, acting upon the advice of a friend, Dato Salleh Yusoff, he consulted his lawyers Messrs Tunku Zuri, Manan & Abdullah, who sent a letter dated 8 April 1980 (p 30 AB) addressed to Dato Low, which I find was duly received, in the following terms:

8 April 1980

Mr Low Yow Chuan,
c/o Federal Hotel Sdn Bhd,
Jalan Bukit Bintang,
Kuala Lumpur

Dear Sir,

Re: Sale Agreement dated 12 July 1971

We have been instructed to write to you on behalf of Mr Alfred Templeton.

We are informed that in accordance with the above agreement under which you purchased certain pieces of land from Mr Templeton the sale to you was subject to the right of way of owners of adjacent holdings to and from their land to the existing road.

We are further informed that you are currently developing the area purchased by you and that such development has not provided for the right of way reserved by the above agreement.

We would be grateful if you could kindly confirm whether or not such right of way is to be provided in accordance with the agreement. We solicit any early clar-

ification from you before advising Mr Templeton of any further action in this matter.

Yours faithfully,
sgd
cc Client

However, the letter evoked no response. Instead, unbeknown to the plaintiffs then, the defendant company had on 8 April 1980 entered into a sale and purchase agreement (p 21 AB) whereby it had agreed to sell certain land, to wit, lot T-3 (see pp 22 and 29 AB) which was situated on the existing road, to one Lim Kim Chuan. Similarly, the defendant company had also on 8 October 1980 entered into another sale and purchase agreement (pp 31 to 33 AB) whereby it had agreed to sell certain land, to wit, lot T-2, adjacent to lot T-3, also situated on the existing road, to one Sobri bin Haji Ahmad Tajuddin.

Manifestly, the defendant company had no intention of honouring its undertaking for the provision of a right of way under cl 11. In these circumstances, it was not at all surprising that notwithstanding the receipt of reminders from Messrs Tunku Zuri, Manan & Abdullah, the defendant company studiously refrained from replying thereto. Messrs Tunku Zuri, Manan and Abdullah had in fact written a letter dated 8 August 1980 addressed to Dato Salleh Yusoff (exh P5), the friend and adviser of the first plaintiff, telling him of the position.

At first, the first plaintiff, who was then in Perth, felt that he should take time to consider his position, since, to quote him:

> Low Yow Chuan being a millionaire as well as a friend, perhaps we could reach some sort of understanding and settlement in the future.

However, in February 1981, the first plaintiff heard from his sister Phyllis, the third plaintiff, that earthworks had begun on the defendant company's condominium scheme on lot 39. So he flew from Perth to Penang and inspected the site and saw excavated soil being dumped from lot 39 onto lot 48. He said, and I believe him, that he then spoke to one Mr Eng, the defendant company's project manager, asking that a retaining wall be built to stop spillage onto lot 48 and received a favourable response. As a result of this assurance, the first plaintiff felt more comfortable and returned to Perth.

But then, two months later, in April 1981, the first plaintiff flew out to Penang again and, accompanied by an architect Dato Lim Chong Keat and Dato Salleh, he inspected the site with a view, so he said, of going into an intended joint venture project with a contractor Lim Kah Bee who owned a neighbouring lot, to develop lot 55. It was then that the first plaintiff said, and I believe him, that he saw that his family house which stood on lot 48 was being buried by reason of the earthworks carried out by the second defendant on the defendant company's condominium scheme on lot 39 and also that construction of buildings had begun thus hindering access. Dato Lim advised the first plaintiff to take legal action straightaway.

To resume the narrative of events, the first plaintiff then returned to Australia and wrote a letter dated 5 May 1981 addressed to Messrs Lim Kean Siew & Co (p 34 AB), the firm of solicitors who had prepared the sale and purchase agreement and who had acted for the defendant company in that transaction, drawing attention to the contractual requirement for a right of way and requesting them to intervene in the matter. This letter was in the following terms:

> 5 May 1981
>
> Lim Kean Siew & Co,
> Bank Negara,
> Leith Street,
> Penang
>
> Dear Sir,
>
> I refer to the agreement of sale of our property to Low Yow Chuan. Under this agreement a clause was included that the sale of our property is only sold subject to the right of way of owners along neighbouring holdings to and from their land on the *existing road*.
>
> A recent visit to our site it would appear that the access road has been built upon in breach of the above agreement.
>
> As solicitor representing the purchaser at this time, I shall be grateful if you could draw attention to your then client regarding this matter.
>
> Thanking you.
>
> Yours faithfully
> sgd Alfred Templeton

Having received no answer to this letter, some eleven weeks later, to be precise, on 29 July 1981, the first plaintiff once again flew out to Penang and called personally at the offices of Messrs Lim Kean Siew & Co and, upon his instructions, they wrote a letter dated the same day addressed to Dato Low Yow Chuan wherein mention was made of the promises made to the plaintiffs during the negotiations for sale. This letter which I find was duly delivered by hand by the first plaintiff was in the following terms:

> 29 July 1981
>
> Datuk Low Yow Chuan,
> c/o Low Yat Holdings Sdn Bhd,
> 468-6E Jalan Ipoh,
> Kuala Lumpur 13-04.
>
> Dear Sir
>
> Re: Holding nos 63(1), 64(1), 78(1), 78(2) and 80 Mukim 17 NED Penang together with buildings erected thereon bearing addresses Nos 2 to 7, 236, 251 & 219 Batu Ferringhi Penang
>
> We refer to the purchase of the above property by agreement dated 12 July 1971 in which we represented you as solicitors.

Our attention has been drawn to the fact that the existing road leading to Mr Templeton's family house on lot 48 and to lot 55 has now been cut off by your development. Moreover, your bulldozers have completely buried the said house on lot 48.

Mr Templeton wrote to us regarding this matter on 5 May 1981 and a copy of this letter was sent to you on 8 May but we have not received any reply from you. It would appear that the complaint of Mr Templeton in his said letter of 5 May has been ignored.

Our Mr Lim Kean Siew who took part in the negotiations in the sale of the property confirms that the sale of the lands to you was expressly conditional upon the previous owners having the right to exercise the right of way on the existing road. Without this condition the previous owners would not have sold the lands.

Mr Templeton has sought our Mr Lim Kean Siew's assistance in this matter with a view to seeing you with the hope of settling this matter amicably and he will now be handling this letter personally.

Yours faithfully,
sgd

However, this letter elicited no answer. Whilst in Penang at this time, the first plaintiff said, and I believe him, that he visited the site and saw that the defendant company's workers were encroaching into and dumping soil on lot 55 and also that the soil they had dumped on lot 48 had nearly completely buried the family house. He also testified that he had seen a roadway being cut into lot 55 and it being used as a place of storage for bricks, machinery, trucks, cranes and other building materials.

In these circumstances, the plaintiffs retained Messrs Gan Teik Chee & Ho, advocates and solicitors, who sent a letter dated 7 July 1981 (p 35 AB) to the defendant company listing out generally the grievances of the plaintiffs. This letter was in the following terms:

7 July 1981

Low Yat Holdings Sdn Bhd,
468-6E, Jalan Ipoh,
Kuala Lumpur

Dear Sir

Holdings 63(1), 64(1), 78(1), 78(2) and 80 Mk 17 NED Penang

We act for Alfred Templeton, Phyllis Templeton and Rita Templeton, the trustees and registered proprietors of the above properties.

Our clients instruct that under an agreement dated 12 July 1971 for the sale of the above properties to Low Yow Chuan, they reserved a right of way from Batu Ferringhi Road over the existing road and according to existing usage for access to neighbouring lands in particular to holdings 64(10) belonging to our clients. Subsequently our clients transferred the above properties to your company as nominee of Low Yow Chuan and planning approval has been obtained for a housing scheme thereon.

It has now come to our clients' knowledge that your proposed housing scheme does not provide for the right of way as reserved in the agreement dated 12 July 1971.

Furthermore since early 1981 your servants or contractors have been levelling the said properties and depositing excavated material onto adjacent lands including holding 64(10) thereby submerging the premises situated on the said holding 64(10). You are hereby requested to have your servants or contractors cease further trespass and nuisance as aforesaid, to clear the existing excavated material and to ensure that the reserved right of way is secured.

Please let me have your early reply.

Yours faithfully,
sgd Gan Teik Chee & Ho

Similarly, Messrs Gan Teik Chee & Ho sent another letter dated 31 July 1981 to the second defendant (p 37 AB) in the following terms:

31 July 1981

Lim Gim Seng,
Building Contractor
72 Selok Slim
Penang

Dear Sir,

Nuisance and Trespass on holding 64(10) Mk 17 NED Penang

We enclose herewith a copy of letter dated 7 July 1981 which is self-explanatory.

Our clients instruct that you are the builder responsible for the nuisance and trespass mentioned in the enclosed letter and that you are storing building equipment and material on our clients' land.

Please note that unless you cease and desist from the said nuisance and trespass and remove your possessions immediately, legal action will be taken against you and Low Yat Holdings Sdn Bhd.

Yours faithfully,
sgd
Gan Teik Chee & Ho

Encl

Having received no replies to either of these letters, Messrs Gan Teik Chee & Ho sent further letters (which elicited no answers) to both the defendants dated 1 August 1981 and 19 September 1981 (pp 38, 39 AB) repeating their complaints about trespass and nuisance and threatening legal action in the following terms:

1 August 1981

Low Yat Holdings Sdn Bhd
468-6E, Jalan Ipoh
Kuala Lumpur

Dear Sir,

Nuisance and trespass on lot 64(10) and the vicinity

We enclose herewith a copy of letter dated 31 July 1981 to your building contractor for your information.

Unless you have the nuisance and trespass ceased immediately, we shall commence legal action against you and your said contractor.

Please let us know whether you have solicitors to accept service on your behalf.

Yours faithfully,
sgd
Gan Teik Chee & Ho

Encl:

19 September 1981

Low Yat Holdings Sdn Bhd
468-6E, Jalan Ipoh
Kuala Lumpur

2 Lim Gim Seng
Building Contractor
72, Selok Slim
Penang

Dear Sirs,

Nuisance and Trespass on holding 48 Batu Ferringhi Sek 2 Penang

We regret not to have heard from either of you on our letters of 7 July 1981 and 31 July 1981 respectively.

Our clients instruct that in the meantime the nuisance and trespass are continuing.

Please note that unless you cease the said nuisance and trespass within seven days we shall be applying to court for injunctions against you.

Yours faithfully,
sgd
Gan Teik Chee & Ho

cc Phyllis Templeton
36, Jalan Sentosa
Penang

Datuk Mohd Salleh Yusof
No 12 Jalan 12/7
Petaling Jaya
Selangor

In the result, Messrs Gan Teik Chee & Ho caused the writ herein to be issued on 26 September 1981.

I now turn to events subsequent to the issue of the writ. Now, the first plaintiff further testified that during a visit to the site in October or November 1982, he had seen servants or agents of the defendants continuing to trespass into lot 55. In particular, he stated that he had seen bricks, steel pipes, concrete piles and concrete lying thereon. Furthermore, he testified that he had seen trucks going up and down the area. Speaking about his site visits during the period 16 October 1982 to 6 November 1982 he said this:

> I then inspected the property and found work was still proceeding even on those buildings affected by the order for interim injunction. I also saw trespassing on lot 55. Bricks, steel piles, concrete piles and equipment were lying on lot 55 – the top of and adjacent to defendant company's property. Trucks were going up and down carrying building material to the work site. Just next to lot 55, I observed that construction of multi-storey luxury apartments were in progress. Lot 55 appeared to be used by the workers as a dumping ground.
>
> I also noticed that defendant company's workers were using lot 55 as a place for the storage of their things and also as a platform to work from. (p 15A to D).

A scrutiny of the record will show that the first plaintiff's testimony as to what he saw during the site inspections was strongly corroborated by his architect Mr Bellotti who, upon the plaintiffs' solicitors' instructions, had been monitoring the defendants' progress of work.

I propose to touch upon this aspect of Mr Bellotti's testimony; in doing so, I shall, to begin with, have to go back a little, to a period in time prior to the date of issue of the writ herein.

In June 1981, Mr Bellotti said that he had seen a considerable amount of excavated material deposited on lot 48 so much so that the plaintiffs' family house was virtually buried leaving only the front porch visible. Lot 48, he said, had been levelled off at the top and was being used for the storage of building materials by the defendant company. He further said that from plans he had obtained from the Land Office he was able to verify that three houses built on the defendant company's site on lot 39 had encroached onto the access road and that the defendants seemed to be concentrating on completing those houses. He added that he had reported the results of his site inspection to the plaintiffs' solicitors who, accordingly, sent the two letters dated 7 July 1981 and 31 July 1981 separately addressed to each defendant (pp 35, 37 AB, hereinbefore reproduced) complaining about the trespass and nuisance and calling for remedial action.

There was no answer to either of those letters from the defendants and, subsequently, the plaintiffs' solicitors sent the further letter dated 1 August 1981 addressed to the defendant company (p 38 AB, hereinbefore reproduced). Consequent to that, the plaintiffs' solicitors wrote the letter dated 19 September 1981 addressed to the defendants (p 39 AB, hereinbefore reproduced.) As before, there was no answer to either of these further letters.

In September 1981, Mr Bellotti found that nothing had been done to remove the spoil on lot 48 or improve the access thereto. In mid-November 1981, he observed that work appeared to be concentrated on the three end houses on plots 100, 101 and 102 shaded black in the plan attached to P9, fronting lot 48. He noted that these three houses had encroached onto the existing access road. He further noted that the defendants had levelled off the excavated material on lot 48 and were using it as a working platform and as a place for the storage of building material and equipment. In support, he produced a photograph (P28). Accordingly, he reported to the plaintiffs' solicitors about the results of this inspection and they sent a letter to the defendants' solicitors dated 21

November 1981 (p 41 AB), which elicited no reply, in the following terms:

21 November 1981

M/s Chang & Vello
Advocates & Solicitors
Penang

Dear Sirs,

Penang High Court
Civil Suit No 375 of 1981

We refer to our Mr Gan's consent on the telephone on 14 November 1981 to an extension of time till 24 November 1981 for you to file your clients' defence on condition that building operations in respect of houses being erected on the land occupied by our clients' right of carriageway are suspended for the time being.

Our clients have just instructed us that over the last few days your clients are hurriedly proceeding with the construction of the houses abovementioned.

In the circumstances, we do not consider ourselves bound by the agreed extension of time. Furthermore, unless your clients adopt a more reasonable attitude, we shall advise our clients to apply for punitive damages and for an injunction to restrain your clients from perpetuating their wrongful position.

Yours faithfully,
sgd

cc The senior assistant registrar
High Court
Penang

Speaking about the maximum point of encroachment into lot 48 by the defendants during the last quarter of 1981, Mr Bellotti said this:

I produce a photograph taken by Mr Chua, a TA of our office, taken I believe during the last quarter of 1981. I was present when it was taken – put in by consent but subject to cross-examination – P22. It depicts the perch on the left and part of the excavated material – more accurately, the maximum point of encroachment of the excavated material on lot 48. It is approximately 90 ft from the boundary separating lots 48 and 39, taking the point of the boundary stone on lot 106 (p 50 AB). This estimate of 90 ft I based on survey map in p 50 AB. Yes, it could be less than 90 ft but certainly more than 60 ft (p 95A to C).

In late November 1981, Mr Bellotti made another site inspection. He observed the commencement of removal of spoil from lot 48 although, so far as he knew, no consent had been obtained to enter lot 48. It seemed to him that the defendants were concentrating on completing the three end houses aforesaid. Accordingly, he reported to the plaintiffs' solicitors about the results of this inspection by a letter dated 24 November 1981 (p 42 AB) in the following terms:

24 November 1981

M/s Gan Teik Chee & Ho
Advocates & Solicitors
2, Che Em Lane (1st Floor)
Penang
Attn: Mr Gan Teik Chee

Dear Mr Gan,

Re: Templeton's land, Mt Pleasure

Further to our telephone conversation today, we confirm that we carried out an inspection of Mr Templeton's land and what remains of his house. We found that contractors are now excavating and removing the soil dumped on the site previously.

The photographs show a mechanical excavator and a JKR lorry progressing with the work. We find this operation quite extraordinary. These photos also show the houses built over the existing rear access road. The progress stage is concreting up to roof level, and the commencement of brickwork on the gable and at ground floor.

Yours faithfully,
sgd
Leo Bellotti,
for Jurubena Bertiga

The photographs referred to in his letter dated 24 November 1981 were duly produced and marked P25A to C.

In January 1982, Mr Bellotti found progress of work was still being concentrated on the three end houses aforesaid and produced a photograph, P19, in support thereof. He observed that all excavated material was transferred from lot 48 to lot 55. He said he had made a thorough inspection of lot 55 at this time and found that considerable material, namely, rocks, boulders and earth, had been deposited there. He also found that lot 55 had been flattened by the defendants and was being used for building operations. He recalled that a lorry driver had asked him to get out of the way but upon his taking objection that it was somebody else's land, it just went around him.

On this occasion, Mr Bellotti added that erosion of lot 55 had already begun. He explained that lot 55 was being used by the defendants for the construction of a condominium block of 16-storey apartments on lot 39. At this stage, six storeys had been completed.

Mr Bellotti opined that it was absolutely necessary for the defendants to use lot 55 as an access to the condominium site on lot 39 because they had no access within their own land which was very steep.

Later, in January 1982, Mr Bellotti said that he had approached the City Council architect Mr Raymond Thong and mentioned the problems faced by the plaintiffs and also asked to see the defendant company's approved earthwork plans and, upon inspection thereof, discovered for the first time that there was no access road for the plaintiffs' lots on the plan. He then said that he queried Mr Thong as to why the access road had disappeared since the brochure issued by the defendant company to prospective purchasers showed a 20 ft backlane adjacent to lots 48, 49, 50, 51 etc and separating lot 39 from them. Mr Thong replied that all the City Council required was a six ft wide drain reserve.

Mr Bellotti then recalled that on 5 February 1982 the plaintiffs' solicitors had obtained an interlocutory injunction against the defendants and so, on 6 February 1982 he had visited the site to see if the defendants were complying with it and found that they were not. Accordingly, he reported the results of this inspection to the plaintiffs by letter dated 6 February 1982 (p 4 DAB) in the following terms:

> 6 February 1982
>
> M/s Gan Teik Chee & Co
> Advocates & Solicitors
> 2, Che Em Lane
> Penang
> Attn: Mr Gan Teik Chee
>
> Dear Mr Gan,
>
> Re: Templeton's land
>
> Following your instruction yesterday, we enclose two photographs taken early this morning showing work still in progress on the three end houses adjacent to Mr Templeton's land – lot 48. During our inspection, we did not see any workers on the other six end houses on blocks X and I because the concentration of work has been directed on the completion of the three end houses fronting lot 48.
>
> At present, brickwork is in progress and the steel reinforcement was being placed in position in readiness to cast a concrete slab adjacent to the road. Also door frames are being fixed.
>
> We will continue to monitor the progress of the work.
>
> Yours faithfully,
> sgd
> Lee Bellotti
> for Jurubena Bertiga

On the same day, 6 February 1982, the plaintiffs' solicitors sent a letter of complaint of the same date, to the defendants' solicitors (p 47 AB), which elicited no reply, in the following terms:

> 6 February 1982
>
> M/s Chang & Vello
> Advocates & Solicitors
> Penang
>
> Dear Sirs,
>
> Civil Suit No 375 of 1981 Consent order for interim restraint until hearing of injunction
>
> Further to our telephone conversation this morning, we enclose copy of letter dated 6 February 1982 from our clients' architects which is self-explanatory.
>
> It is obvious that your clients are concentrating on completing the erection of the three houses adjacent to lot 48 in contempt of yesterday's consent order.
>
> Please note that unless all work whatsoever in respect of the nine houses in question is suspended immediately, we shall have your clients cited for contempt of court and also apply for an interlocutory mandatory injunction for the three houses fronting lot 48 to be demolished.
>
> Yours faithfully,
> sgd
> GTCH
>
> Enc
> cc
> Senior assistant registrar,
> High Court, Penang

However, shortly following that complaint, a site meeting was held at which those present were the solicitors for the plaintiffs and the defendants, one Mr Kee Kow (DW1), a resident director of the defendant company and Mr Bellotti. Speaking with regard to the events at this meeting Mr Bellotti said this:

> There was no dispute as to the fact that defendants had deposited excavated material on lot 55. It was suggested plaintiffs should be thankful for deposit of excavated material. I don't agree with this because we would have to pile all through that rubbish. It was unconsolidated and eroding away, posing a problem for us later of having to retain all that in the event of future development.

Mr Bellotti then proposed certain remedies by a letter dated 12 February 1982 addressed to the plaintiffs' solicitors (exh P17) in the following terms:

> 12 February 1982
>
> Gan Teik Chee & Ho
> Advocates & Solicitors
> 2, Che Em Lane
> Penang
> Attn: Mr Gan Teik Chee
>
> Dear Mr Gan,
>
> Re: Templeton's land
>
> Further to our telephone conversation last week and my letter dated 1 February 1982, I need to give more information on the question of the temporary access road cut through plot No 55 by the contractors working on the adjoining development.
>
> This temporary road was cut without permission for the contractor's own convenience in disposing of surplus excavated material.
>
> You mentioned that whilst it is admitted that trepass has occurred the contractor's intention is to make good plot No 55 on completion.
>
> I have to state categorically that this would be quite impossible to achieve. The road now forms a deep cutting through the land and excavated material spills on to adjoining land.
>
> The ground has been seriously undermined and erosion has commenced following the removal of the top soil and vegetation. Moreover, the ground is now unstable and in danger of collapse due to a landslide.
>
> There is no way that lot 55 could be reinstated, any earth put back to restore the original levels would be unconsolidated and in danger of being washed away in wet weather.
>
> This appalling situation which the contractors have created with complete disregard to adjoining owner's land makes any future development of lot 55 almost impossible.
>
> It is our considered view that without the construction of heavy and expansive retaining walls any future development of this lot could not take place.
>
> Yours faithfully,
> sgd
> Lee Bellotti for Jurubena Bertiga

I must now refer to the evidence adduced by the defence relevant to the questions of trespass and nuisance. The defence relied upon the testimony of Mr Kee Kow (DW1), the resident director of the defendant company, who testified that during the progress of earthworks, bulldozers might have knocked down the boundary pegs and this could have caused a little bit of spill over the boundary into lot 48. He further testified that during the rainy season in July and August 1981, there might have been some wash of earth and slime onto lot 48 and that as a result of complaints by the first plaintiff, the defendants had in November 1981 taken steps to remove the same. Referring to the photograph P28 introduced by Mr Bellotti, he denied that the wooden form work shown in it was within lot 48.

However, Mr Kee Kow admitted that in August 1981 when foundation work for the condominium block on lot 39 was in progress earth had been deposited on lot 55 and a small portion of lot 56, by mistake. This is how he explained it:

> Because at that time we did not know it was Templeton's land. We thought that it was Lim Kah Bee's land. We also thought that it was good to do so because it was a valley.

On a point of information, Mr Lim Kah Bee was, at the material time, the owner of lot 371 which adjoined lot 39 and, between these two lots, was lot 55. According to Mr Kee Kow, Kah Bee was also a good friend of Dato Low, the manager director of the defendant company.

To summarize, therefore, so far as lot 48 was concerned, the defence contention was fourfold:

(1) that the spoil on lot 48 was removed in November 1981;
(2) that no damage was in fact occasioned to lot 48 and so it had suffered no diminution in value;
(3) that the plaintiffs had not suffered the loss of its use since there was no evidence that they had intended to put it to any use;
(4) that, so far as the family house on lot 48 was concerned, it was a tumbled-down house covered by secondary jungle even before the defendants commenced building operations and so was beyond repair.

So far as lot 55 was concerned, the defence contention was twofold: (1) that the deposit of earth on lot 55 was caused by mistake and (2) that in any event, the deposit was beneficial for the development of lot 55.

I must now evaluate the evidence that by reason of the defendants' earthmoving operations aforesaid, the first plaintiff had made a detailed and formal complaint in writing dated 25 January 1988, addressed to the Pengarah Kejuruteraan, Majlis Perbandaran Pulau Pinang (exh P9) in the following terms:

> 25 January 1983
>
> Pengarah Kejuruteraan
> Majlis Perbandaran Pulau Pinang
> Dewan Bandaraya
> Pulau Pinang
>
> Tuan,
>
> Contravention of earthworks by-law at Mount Pleasure, Batu Ferringhi Road on lot 39 section 2, town of Batu Ferringhi, NED Penang
>
> We are the owners of lot 48, 55 & 56, Mk 17, north-east district, Penang and we wish to bring your attention to the fact that earthworks operations carried out in our neighbouring land, namely, lot 39, has been indiscriminate and have adversely affected our three properties, namely, lots 48, 55 and 56.
>
> Our lawyer, Gan Teik Chee, has written to your office on 7 October 1982 and 4 December 1982. On 21 January 1983, we made a visit to your office. We hereby express our displeasure over the encroachment over our lots in the following context:
>
> (a) *Lot 48, Mk 17 NED*
>
> This lot has been used as a dumping ground for the earthworks from the neighbouring lot of lot 39. Although the main spoil has been removed, our old house that has been there for years, has been damaged and there is only a few porch pillars left.
>
> We find this outrageous and are not happy how the earthworks operation of lot 39 could be allowed to damage neighbouring properties by either your council or by consulting engineers of Low Yat Holdings.
>
> Although the spoil on this lot has been removed, we still find blasting and earthworks in process next to this lot; we wish you could exercise some control of earthworks by-laws to contain their operations and to insist on a concrete retaining wall to contain the height difference of about seven to ten ft to prevent soil erosion onto our lot.
>
> (b) *Lot 55, Mk 17 NED*
>
> This lot of about three-quarter acres in size, were originally a gentle sloping hillslope. It is now filled with boulders and earth, dumped as a result of earthworks operation on neighbouring lot 39. We wonder how this practice of creating a nuisance and affecting the value of our property on this lot 55 has been overlooked or allowed.
>
> Low Yat Holdings has been using this lot 55 in addition as dumping ground, as a place to produce cement bricks, storing sewage pipes and using this as an access and platform for the construction of the 20-storey condominium. The construction of this 20-storey tower block has reached 12 storeys and yet Low Yat Holdings has not even constructed his own access.
>
> We wonder how this rampant use of other people's properties for dumping as well as access be overlooked by your council.
>
> We would request your good office to immediately ask Low Yat Holdings to vacate this lot without any further delay and to stop trespassing onto our land, along boundary of which, we have erected a wooden fence and of which, Low Yat Holdings has repeatedly taken down for free passage of vehicles and plants and for which we are not able to super-

vise and control, simply because we are refused entry to the scheme at the main road.

We request your office to exercise strict control over these arrogant attitudes towards our natural rights.

We would also request your office to instruct Low Yat Holdings to remove all spoils immediately from our lot, restore it to its natural state, to construct retaining walls whenever necessary to protect our land from any possible soil erosion, and to reinstate all boundary stones.

(c) *Lot 56, Mk 17, NED*

The dumping on lot 55 has overspilled to lot 56 and there is now a huge drop of about 100 ft from the top of the earth platform on top of lot 55 to this lot and the existing streams on this lot will definitely be affected by heavy downpower.

We feel this is a rampant disregard for our legitimate rights and we request your office to exercise the powers that have been vested in your council to rectify the situation and to restore the slopes and ground to its natural state.

(d) *General*

We feel Low Yat Holdings has not been carrying out its earthworks operation in a responsible manner, or to approved earthworks plans.

We feel that they have not cut their hill low enough in accordance with the earthworks plans they have submitted and duly approved by your council, in order to save cutting costs of earth and rocks and to reduce the construction of retaining walls. In this way, there is more fill on the sides of the hill slopes and since there is no retaining wall to contain such fill, the sides of the fill has overspilled the slopes, thereby causing more soil erosion, more possible slip failures, softer foundation for their link house that are situated near the boundary on the slope and also to prevent any cutting or excavation by the front lot owners, which, if executed, would amount to removal of support and would give rise to legal complications between the purchasers of these front row houses and the front lot land owners.

We would also like to bring to your attention that in the standard sales agreement of Low Yat Holdings to these house purchasers, there is a clause that says that they will not be responsible for any landslide after the issue of occupation certificates.

We feel that the developer has an intention of denying responsibility for the stability of construction of houses on the edge of the hill slopes and together with this disregard to conforming to approved plans and lack of proper consulting engineer's supervision, this earthworks operation will cause untold complications to either the council, the house buyers or the front lot land owners.

In this respect, we enclose a sketch to show:

(a) the area of lot 39, that we feel is irresponsibly executed;
(b) a typical section of the present cutting and filling operation (assumed) and its corresponding slip circle failure possibilities.

We wish to call upon your office to exercise Cap 1 s 3, cl (4) of Street, Drainage & Building (Amendment) Act 1978, Act A 435 to order the immediate cessation of all building or earthworks in this area, until the above could be confirmed by your office and until the necessary making good of defects created rectified.

Yours faithfully,
sgd

cc
Pengarah Perancangan
Majlis Perbandaran
Pulau Pinang

Pengarah Bangunan
Majlis Perbandaran
Pulau Pinang

M/s Gan Teik Chee & Ho
Advocates & Solicitors
Penang

As a result of that complaint, the City Council engineer Mr Khoo Say Boon (PW4), called for a site inspection which was duly held on 8 February 1983. Present at that site inspection were the resident engineer of the defendant company, a Mr Tan, their site supervisor, a Mr Chew, a resident engineer retained by the defendant company, a Mr Andrew Khoo of the firm of Jurutera Jaya Usaha, Penang, and, of course, Mr Khoo Say Boon himself.

As I consider Mr Khoo Say Boon to be an independent witness who knew what he was talking about, it is necessary to make extensive references to his testimony. Mr Khoo began by saying that he was familiar with the defendant company's development on lot 39, then referred to the complaint by the first plaintiff which he had received and the site meeting he called consequent thereto in the following terms:

> Yes, I am aware of the Mt Pleasure scheme somewhere in Batu Ferringhi. The developer is Low Yat Holdings Sdn Berhad. Yes, I have inspected this development – normally I would inspect once or twice a month.
>
> Yes, in January or February 1983, I received complaints about earthworks in this scheme. The complaint was in writing dated 25 January 1983. I have it with me – produces – put in and marked P9. The gist of the complaint concerned encroachment of earthworks onto neighbouring lots. Yes, the complaint as regards lot 48 was that it was being used as a dumping ground and asked for construction of a retaining wall to contain the height difference.
>
> Yes, there was also a similar though very serious complaint as regards lot 55.
>
> Yes, I was requested to intervene in this matter in the manner set out in P9. Yes, there was also a complaint about lot 56 which was behind lot 55. Here, too, I was asked to intervene.
>
> There was also a complaint in P9 that the earthworks were not being carried out according to approved plans in order to save costs giving rise to slips.
>
> I acted on P9, by calling for a meeting and a site inspection on 8 February 1983. Present at this site meeting were the resident engineer of Low Yat Holdings, a Mr Tan, their site supervisor, a Mr Chew, and the resident engineer retained

by Low Yat Holdings, a Mr Andrew Khoo of the firm of Jurutera Jaya Usaha of Penang, and myself as representative of the City Council, Penang.

And then, referring to the events at the site meeting on 8 February 1983, he said this:

At this meeting I asked Mr Tan and Mr Chew to consider construction of a retaining wall on lot 48 and to remove the earth from lot 55 and lot 56. I also told them to construct their own access leading to the 20-storey condominium which is still under construction. I told Mr Andrew Khoo to resubmit an amended earthworks plan because the layout of the proposed houses on site did not adhere to the approved lay-out plan as shown on the earthworks plan. I believe most of the proposed houses which were almost completed at the time of the inspection by me, did not adhere to the approved lay-out plan as shown in the earthwork plan.

Q: Why was it necessary for you to request them to construct their own access road to lot 55?
A: Because of para 2 p 2 of P9. I felt that this para was justified. I came to this conclusion as a result of my inspection of the site.

I did not notice any vehicles going through lot 35 during my inspection. However, I saw there was only one possible access to the condominium site and that was through lot 55. Para 8 of encl 82 (affidavit of Kee Kow affirmed 28 March 1983) read out to witness:

Q: During your site inspection on 8 February 1988, did you see the brick wall and/or wooden fence mentioned in para 8 of encl 82?
A: I did not see the brick wall but I am not sure about the wooden fence.
Q: What was the state of the road depicted in the photograph being exh KHH exhibited to encl 82, at the time of your site inspection on 8 February 1983?
A: It had not then been tarred.

Amplifying his evidence as to the events at the site meeting on 8 February 1983 and his observations there, he said this:

Yes, at the site meeting on 8 February 1983 I did draw the attention of representatives of Low Yat Holdings to the complaint, P9, including para 2 p 2. When I suggested the remedial steps which should be taken and to which I have earlier referred to on the occasion of the site meeting on 8 February 1983, the representatives of Low Yat Holdings Sdn Bhd said that they would construct their own access and that they would remove the earth overspilled from their site onto lots 55 and 56, after Chinese New Year. When I say representatives I mean Mr Tan and Mr Chew. From what I saw at the inspection, I inferred that Low Yat Holdings were then using the access through lot 55 to their condominium site. I drew this inference because their own access was steep and obstructed by boulders and full of holes and depressions and also an abandoned concrete mixer. I also noticed building materials on lot 55 such as pipes, bricks and a concrete mixer. The concrete mixer was quite near to the condominium. I am not sure if the concrete mixer was within lot 55 or near the boundary.

No, when told about the complaint, P9 para 2 p 2, there was no denial on the part of representatives of Low Yat Holdings that they had been using lot 55 for access to their condominium.

After the site meeting on 8 February 1983, Mr Khoo said that he wrote a letter dated 10 February 1983, addressed to the defendant company (exh P10) confirming the events there in the following terms:

Translation

10 February 1983

Low Yat Holdings Sdn Bhd
468-5 Jalan Ipoh
Kuala Lumpur

Earthworks for housing development at Mt Pleasure, Batu Ferringhi Road on lot 39, 394 Section 2, town of Batu Ferringhi, north-east district, Penang

With reference to the above, I wish to inform that a visit to the site was made on 8 February 1983 regarding complaints by the proprietor of lots 48, 55 and 56, Section 2, town of Batu Ferringhi. Those present at the site were your representatives Mr Tan (resident engineer), Mr Chew (site supervisor), Mr Andrew Khoo (representative from Jurutera Jayausaha Konsultant Sdn Bhd) and Mr Khoo of the City Council, Penang.

Based on the boundary stones (pegs) pegged by your surveyor, it has been agreed by all present that the earthworks carried out have encroached onto lots 48, 55 and 56.

For lot 48, approximately five ft of the land had been cut. A brick wall (retaining wall) is definitely required so as to prevent the earth from falling onto lot 48. You are also required to make a study of the surface run-off so that its flow can be controlled with the provision of suitable concrete drains. Plans showing the proposed works must be forwarded to this department for approval before work commences.

Earth and rocks from your site have been pushed down to lots 55 and 56 without consent of its owners. Your representative at this visit has been directed to remove all materials that have been dumped there and to restore lots 55 & 56 to its original condition. Your representative has promised to start work after the Chinese New Year.

It was also noted that lot 55 has been used by your vehicles to convey building materials to the ten-storey apartment.

Rightly, your contractor should use your own access which is located at a higher level. Your representative has also agreed to construct this access the soonest possible.

I wish to emphasize here, in view of the fact that the construction of the 'Townhouses' near to lot 55 are nearing completion, that

(a) all construction works must be carried out in accordance with the approved earthworks plans including proposed levels for all building proposals;
(b) complaints from residents adjacent to the building site must be settled

before Occupation Certificates can be forwarded for consideration. Therefore it is important that the above two matters be settled at the early stage. It has been noted that several amendments have been made without prior approval from this department. Your representative has been told to show the lot boundaries and levels achieved on the site.

Your attention is drawn to ss 4 and 9 of Act A435 which are reproduced below:

4) The local authority may, where it certifies that the safety of life or property is affected or is likely to be affected by any earthworks, order the immediate cessation of the whole or any part of the earthworks; the certificate of the local authority under this subsection shall be conclusive proof of the matters stated therein and shall not be questioned or subject to any appeal or review in any court.

9) Any person who contravenes any provision of this section or fails to comply with any direction or order given under this section (or does any act to obstruct in any manner whatsoever the entry or the execution of any work authorized to be effected or executed under this section by or on behalf of the local authority) shall upon conviction be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both, (and in the case of a continuing offence to a fine which may extend to five hundred ringgit for every day during which the offence is continued).

The council may direct you to cease the earthworks if the directions are not complied with.

That is all.

Service for the country.

Your obedient servant,
sgd
for Pengarah Kejuruterran

sk
Jurutera Jayausaha Konsultant Sdn Bhd
No 77 Cantonment Road, Perangi.

En Freddy Templeton
No 26 Jalan Sentosa
Hillside, Penang
(Your letter dated 25 January 1982 refers)

Assistant Director Low
For your information and advice
Director of Buildings

Questioned on the contents of that letter, he said this:

Yes, I confirm the contents of my letter P10 are correct.

At para 5 of P10, I have observed, 'It was also noted etc.' By this I meant I found signs that lot 55 had been used by D1's vehicles. The signs consisted of tyre marks made by motor vehicles leading from the common boundary, ie the cul de sac; next, I saw building materials lying across boundary, maybe on lot 55 or beyond. By 'boundary' I am referring to portion which I now mark on p 49 AB with little blue crosses. This is the boundary separating lot 55 from the cul de sac. Building materials were scattered everywhere. I can't say exactly where but it was beyond boundary I have marked. Building materials consisted of pipes, cement bricks, debris from building construction.

(P9 last sentence p 1 referred to witness). Yes, I found lots 55 and 56 filled with rocks and bolders during my site visit on 8 February 1983.

(P9, p 2 para 4 read to witness). I noticed part or portion of a wooden fence still standing during my visit on 8 February 1983. Yes, I can mark the position of this fence. I do so in blue circles on p 49 AB. I consider this a third sign. It looked like someone had dismantled the fencing. I got this impression because one end of the fencing appeared jagged, not smooth.

I found yet another sign: namely lot 55 had been completely filled with earth. I consider that it would have been impossible for this to have been done without using vehicles.

Mr Khoo also said that he had made subsequent site inspections on 17 February 1983, 23 February 1983, 8 March 1983 and 30 March 1983 (the day he testified in court). Explaining his site visit on 17 February 1983, he said this:

The main purpose of my visit on 17 December 1983 was to check first defendant's own access leading to the condominium and whether the earth on lots 55 and 56 had been removed. I found their own access was in the same condition as at the time of my visit on 8 February 1983, ie it was difficult to use because of boulders, deep depressions. Also, no steps had been taken to remove the earthworks on lots 55 and 56.

And, touching on his site visit on 23 February 1983, he said this:

Q: What about your visit on 23 February 1983?
A: I noticed some improvement. I saw labourers working, also vehicles like lorries parked at LYH's own access. I did not notice any lorries using this access – they were parked. (p 43 E to F).

And, touching on his site visit on 8 March 1983, he said this:

Similarly, on my visit to site on 8 March 1983, I did not pay attention whether or not there was a brick wall or any fencing at the cul de sac adjacent to lot 55. This was because my main purpose was to check whether the developer had started any remedial work which I had requested on site inspection on 8 February 1983 and confirmed in my letter, P10, paras 3 and 4. I did not notice whether any building materials were on lot 55 on this site inspection.

And, touching on his site visit on 30 March 1983, he said this:

Yes, my last inspection was yesterday (30 March 1983). I noted that developer's access was much improved. I found depressions to have been filled and rocks to have been removed. Also, the laterite road surface was improved. Yes, I would consider that from the developer's point of view and for his purpose, it could be used by vehicular traffic. I can only say that the portion I have hatched in blue at p 49 AB was much improved. This is because I did not walk beyond the portion I have hatched in blue – this is a winding road. Judging from what I saw that day vehicles could travel between the condominium and the proposed access, ie the developer's own access. Yes, vehicles can also go off the developer's own access to the condominium directly.

I must now state my findings regarding this part of the case.

I would begin by saying that I had no hesitation in regarding Mr Khoo Say Boon as a credible and reliable witness with no axe to grind. He was testifying as to matters coming within the scope of his duties as City Council engineer and he, therefore, had good reason to recall the events at the various site meetings concerned.

He had also made a comprehensive report (P10) wherein he had stated the results of his observations and generally the events at the site inspection on 8 February 1983. Accordingly, I accept his evidence.

Having regard to my findings as to Mr Khoo's evidence, I also have no hesitation in accepting the testimony of the first plaintiff and Mr Bellotti, in so far as they relate to the issues of trespass and nuisance to both lots 48 and 55.

I would add that the contemporary correspondence consisting of the letters of Mr Bellotti addressed to the solicitors for the plaintiffs reporting the results of his monitoring of the earthworks carried out by the defendants, and, consequent thereto, the letters written by the plaintiffs' solicitors to the defendants and their solicitors, the first plaintiff's complaint addressed to the Pengarah Kejuruteraan, Majlis Perbandaraan, Pulau Pinang (exh P9) and the City Council engineer Mr Khoo Say Boon's letter to the defendant company (exh P10(T)) were wholly consistent with the plaintiffs' version, so far as this part of the case is concerned. By contrast, the defence produced no contemporary correspondence and, indeed, the defendant company made no reply to Mr Khoo Say Boon's important letter aforesaid nor, for that matter, did the defendants or their solicitors reply to the plaintiffs' solicitors' letters aforesaid denying the accusations made.

Consequently, I reject as false and untrue the evidence adduced by the defence, in so far as it is contrary to that adduced by the plaintiffs, in regard to this part of the case.

In these circumstances, subject to the special defences of laches limitation, acquiescence, abandonment and waiver, which I shall be considering at a later stage in this judgment, I am satisfied that the plaintiffs have succeeded in establishing liability in tort against both the defendants, on the balance of probability, in so far as the claims for general damages for trespass, nuisance and injury to lots 48 and 55 are concerned resulting in obstruction of access therefrom to the public highway known as the Batu Ferringhi Road.

Turning to the plaintiffs' claim in contract, I must now deal with an entirely separate issue, namely, the interpretation of the expressions 'the existing road' and 'the neighbouring holdings' and 'the right of way' in cl 11 of the sale and purchase agreement.

For convenience, I shall reproduce cl 11 once again; it reads as follows:

> This sale is sold subject to the right of way of owners along neighbouring holdings to and from their land on the existing road and also from holding No 64(10), Mukim 17, north-east district, Penang.

Counsel for the plaintiffs contended that 'the existing road' envisaged by cl 11, had two branches whose combined width was 30 ft as evidenced in the 1935 Survey Department map (p 49 AB). On the other hand, counsel for the defendants contended that the existing road envisaged by cl 11 was the road on the ground as at the date of the sale and purchase agreement as evidenced by their survey map (exh D68) prepared some five months after the execution of the sale and purchase agreement by a private surveyor.

Clearly, cl 11 was not only inartistically worded, it also failed to define the expressions 'neighbouring holdings' and 'the existing road', nor, for that matter, was any plan annexed to the sale and purchase agreement to define those expressions.

Accordingly, since cl 11 is very far from being clear on the points mentioned, I must construe its provisions in the light of the surrounding circumstances. If any authority is needed for that proposition I would refer to *Johnstone* v *Holdway*[1] and *The Shannon Ltd* v *Veneer Ltd.*[2]

In the first of these cases, at p 612, Upjohn LJ said this:

> In our judgment, it is a question of the construction of the deed creating a right of way as to what is the dominant tenement for the benefit of which the right of way is granted and to which the right of way is appurtenant. In construing the deed the court is entitled to have evidence of all material facts at the time of the execution of the deed, so as to place the court in the situation of the parties.

In the second of these cases, at p 691, Dankwerts LJ said this:

> ... we are entitled to have the benefit of the evidence of the surrounding circumstances. A document intended to have legal effect is not executed in a vacuum. It is drafted and executed to deal with the situation in which the parties find themselves. Of course, if the words used in the deed are perfectly clear, they must be given their meaning, and extrinsic evidence is not admissible, because that would be contradicting the terms of the deed.

Now, the testimony of Mr Lim Kean Siew (PW5), the solicitor who acted for the purchaser Dato Low Yow Chuan, the managing director of the defendant company, which I accept, supported the contention of counsel for the plaintiffs. What this witness said was this:

> Shown p 49 AB (the 1935 survey map) – Yes, I am familiar with this area. Yes, this led to the insertion of cl 11. Yes, there was an existing road then.

I am satisfied that Mr Lim was then referring to the existing road appearing in the 1935 Survey Department map (p 49 AB) which was the raison d'etre for the stipulation of the right of way. I also accept the evidence of the first plaintiff who had lived for many years in the family house standing on lot 48 on this point.

I do not consider the survey map D68 put in by the defence to be admissible for the purpose of construing cl 11 since it was prepared some five months subsequent to the execution of the sale and purchase agreement. As Dankwerts LJ said in *The Shannon* at p 693:

> Of course, the documents subsequent to the conveyance of February 6 1930, are not admissible for the purpose of construing that conveyance, ...

Accordingly, having regard to the surrounding circumstances, I find as a fact that 'the existing road' under cl 11 meant the existing road evidenced by the 1935 Survey Department map (p 49 AB) which has two branches whose combined width was 30 ft.

Furthermore, having regard to the surrounding circumstances, I also find as a fact that the expression 'neighbouring holdings' meant the holdings which formed part of the Mount Pleasure property owned at one time by the deceased TV Templeton, including of course, the lots 48, 55 and 56, retained by the plaintiffs and still owned by them.

It follows, therefore, that in the context of the issues which arise for decision in the present case, I find as a fact, that for purposes of s 282(3) of the Code, that the dominant lands are lots 48, 55 and 56 whilst the servient land is lot 39.

There is a further point of construction regarding cl 11 which I must now deal with and this concerns the law on implied terms. Now, it is generally simple to state the law on implied terms but often difficult to apply it. Traditionally, terms may be implied by statute or by custom or by reference to the principle in *The Moorcock*.[3]

Ninety-nine years ago, Bowen LJ giving judgment in *The Moorcock*, explained that terms would be implied by law where they arose from the presumed intention of the parties and were necessary to give efficacy to the parties' transaction and, some fifty years later, in *Shirlaw* v *Southern Foundries Ltd*,[4] MacKinnon LJ restated this principle by saying the law would imply 'something so obvious it goes without saying'.

In the present case, cl 11 does not expressly provide for the creation of an easement of way under the provisions of ss 286(1) and 288(b) of the Code. Yet, approaching the matter on the basis of officious bystander test, I think it could be confidently predicted that had the parties concerned been asked about the inclusion of such a clause, they would have regarded it as going without saying that the same was to be implied for it was so obviously necessary to give business efficacy to the agreement, that is to say, to make it workable.

In recent times, three different courts dealing with completely different situations, agreed that the term contended for should be implied into the particular contract. I refer to *Wettern Electric Ltd* v *Welsh Development Agency*,[5] *Howman & Son* v *Blth*[6] and *Fraser & Ors* v *Thames Television Ltd & Ors*,[7] which I propose only to mention, since the leading case on the subject is *Liverpool City Council* v *Irwin*.[8]

In the *Liverpool City Council* case, the city council had built a tower block 15 storeys high and let the flats out to tenants. The council retained control of the lifts and staircases themselves but these fell badly out of repair so that tenants could not use the lifts and had to walk up the stairs in the dark. However, the council were careful not to insert any covenant to repair in the tenancy agreements since they did not wish to commit themselves to any obligation to repair. The question for decision was whether there was an implied term that they should repair?

In the Court of Appeal, a majority held that the landlords were under no liability to repair or maintain them because there was no express duty to do so and none could be implied. A term could only be implied, insisted the majority, if it is necessary to give business efficacy to the contract, and here it was not necessary to do so. Lord Denning dissented on the main issue. He was prepared to hold that it was permissible to imply a term in the contract whenever it was reasonable to do so, and that some obligation to repair and maintain the lifts and stairways must be placed on the landlords.

In the House of Lords, Lord Denning's view that the city council were under an 'implied obligation' to take reasonable care to keep the means of access safe was upheld. Construing the contract in its context, the House held that since the use of the stairs and lifts was necessary for the tenants occupying dwelling in the block, the appropriate easements, or rights in the nature of easements, were to be implied into the contract. Furthermore, it held, disagreeing with Lord Denning, that although it was not open to the court to imply terms which it thought were reasonable, the subject matter of the agreement, namely, a high-rise block in multiple occupation, and the nature of the relationship of landlord and tenant, of necessity required the implication of a contractual obligation on the part of the corporation with regard to those easements. Accordingly, the obligation to be implied was one to take reasonable care to maintain the common parts in a state of reasonable care and efficiency.

I would observe that although the House was not prepared to concede a judicial power to imply any 'reasonable' term into a contract, the disagreement seems to have been more about the label to be attached than about the substantive issues. If a court is free to imply 'reasonable' terms, provided only that it calls them 'necessary', then the disagreement between Lord De-

nning and the House of Lords disappears almost entirely. The fact of the matter is that the decision of the House puts such a broad construction on the concept of a 'necessary' term that it seems to mean 'reasonably necessary', and there is not much difference between that and a 'reasonable' term.

Looking back at the requirements for the creation of easements, I note that under the Code which was the relevant law, there are elaborate provisions dealing with easements. I need no more than refer to some of these. Section 282(3) provides that easement means 'any right granted by one proprietor to another, in his capacity as such and for the beneficial enjoyment of his land in accordance with the provisions of the Code'. Section 284 expressly states that 'no right in the nature of an easement shall be capable of being acquired by prescription (that is to say by any presumption of a grant from long and uninterrupted user)', and s 286(3) states that no such right shall be capable of being acquired by any implied grant except in the case of 'ancillary rights' for the enjoyment of an easement which are to be implied in the grant of an easement. There are also provisions as to easements of way and the instrument of grant would have to describe the same as either 'a right of footway' or a 'right of carriageway', the former conferring the right upon the grantee to pass and re-pass over the servient land at all times, and for all purposes connected with the dominant land 'without animals or vehicles' and the latter, 'with or without animals or vehicles': s 288.

In *Datin Siti Hajjah* v *Murugasu*,[9] an action for trespass to land, the defendant claimed that he had acquired a right of way over the plaintiff's land by user of upwards of 20 years. Syed Agil Barakbah J (as he then was) held, inter alia, that the law of easements in the Malay States is now provided for exclusively by the Code which explicitly precludes the acquisition of any easement by long user.

In the circumstances, taking a robust view of what terms may be implied in a contract, I would hold that considering the subject matter of the agreement – sale and purchase of some only of the lots owned by the plaintiff vendors – they retaining adjoining lots – and the nature of the relationship of seller and buyer, these factors of *necessity* required the implication of a contractual obligation on the part of the purchaser or his nominee to execute a valid and registrable instrument in due form for the creation of an easement of way, namely, a right of carriageway in perpetuity, within the meaning of ss 286 and 288(b) of the Code, in order to give business efficacy to cl 11, for otherwise those adjoining lots would be rendered landlocked and sterile. Furthermore, the agreement did not contain the whole contract and the term would have to be implied to complete the contract as the parties must have intended.

I am also completely convinced that the defendant company had notwithstanding numerous requests by the plaintiffs and their solicitors, studiously refused to comply with cl 11 of the sale and purchase agreement which, upon a proper construction, meant that the sale of the lots concerned was subject to a right of way over the existing road on the servient land (lot 39) as evidenced by the 1935 Survey Map (p 49 AB), thus affording access from the plaintiffs' lands, being lot 48, 55 and 56, to the public highway known as the Batu Ferringhi Road.

In the circumstances, I unhesitatingly hold that the defendant company had acted in flagrant breach of cl 11, but for reasons I shall state a little later in this judgment, I am not disposed to granting an order for specific performance thereof. Instead, I shall be making orders analogous thereto, but first I must deal with another and related topic.

Now, on the issue of liability, subject to the special defences of abandonment, acquiescence, delay, laches, waiver and limitation which I shall consider in the final part of this judgment, there remains one important field to be considered and that is what is now called proprietary estoppel. I note that the plaintiffs have by prayer 11(d)(ii) of their amended statement of claim, asked for a declaration as to entitlement to an equitable easement in respect of a right of carriageway from lots 48 and 55 to the public highway known as the Batu Ferringhi Road.

Now, upon the evidence before me, I am amply satisfied that quite apart from cl 11 of the sale and purchase agreement, representations or promises had been made by Dato Low to the plaintiffs during the negotiations for sale, that the sale concerned was, to quote the words of his own solicitors in their letter dated 19 July 1981 being exh P6, 'expressly conditional upon the previous owners having the right to exercise the right of way on the existing road. Without this condition the previous owners would not have sold the lands.'

Furthermore, there was also evidence of the conduct of the defendant company in submitting its original layout plans for the building scheme on the Mount Pleasure property which provided for a 20 ft wide right of way to run alongside the common boundary separating lot 39 from the adjacent lots belonging to the plaintiffs and which plans had been approved by the relevant authorities. This evidence came from the testimony of the defendant company's own project manager Mr Chan and was unchallenged.

Finally, there was also evidence of promises made to the first plaintiff during his meetings with Dato Low and the defendant company's project manager Mr Chan held at the Federal Hotel and at its offices in Ipoh Road, Kuala Lumpur, that arrangements would be made for an alternative access.

The question therefore arises should the defendant company be now permitted to insist on their strict legal rights by relying on their indefeasibility of title, the fact

of non-registration of a right of carriageway in the statutorily prescribed form under s 288 of the Code or non-entry of a caveat under s 84(1)(c) of the National Land Code (Penang and Malacca) Titles Act 1963, when it would be inequitable for them to do so, having regard to the dealings which have taken place between them and the plaintiffs.

I would stress that the circumstances of this case show clearly that if the plaintiffs are totally denied access to lots 48 and 55 ownership of which they retain, these lots would become landlocked. The plaintiffs do not have the advantage of a registrable easement under s 288 of the Code, yet it is manifestly clear that but for the promise made by the defendant company's managing director Dato Low to provide for a right of way as stipulated in cl 11, the sale would never have gone through. The plaintiffs, to the knowledge of the defendant company, clearly relied on that promise when they entered into the sale and purchase agreement. In their original lay-out plan the defendant company had, in fact, provided for the access but in the amended plans they did not. The defendant company is, in my opinion, estopped by its conduct and that of its managing director Dato Low from denying the plaintiffs a right of access from their lots over its lands to the public highway known as the Batu Ferringhi Road.

A few cases will illustrate the point.

In *Crabb* v *Arun DC*,[10] Crabb owned a piece of land in a field. The local council were constructing a road close to the field. Crabb wished to have access to the new road. So, meetings were held between Crabb and council officials in which Crabb and his representatives were given to understand that they would be given access onto the estate road. However, no formal legal steps were ever taken to confirm that. The council however acted as if access had been granted by leaving gaps in a fence it erected between Crabb's land and the road at the agreed points. Later, however, the council blocked up the gaps and refused him access claiming that there was no agreement and demanded payment for the grant of an easement. Lord Denning considered that these facts gave rise to a proprietary estoppel which could in turn be the foundation of a case by Crabb for the grant of an easement without paying anything for it, because the council's conduct had rendered the land sterile and useless for six years, a loss which could be taken into account. It was the council's conduct which led him to act as he did; and this raises an equity in his favour against them. In the circumstances, it was inequitable that the council should insist on their strict title as they did.

To Scarman LJ, who concurred with Lord Denning, the position was this:

> ... The plaintiff and the defendants are adjoining landowners. The plaintiff asserts that he has a right of way over the defendants' land giving access from his land to the public highway. Without this access his land is in fact landlocked, but, for reasons which clearly appear from the narration of the facts already given by my Lords, the plaintiff cannot claim a right of way by necessity. The plaintiff has no grant. He has the benefit of no enforceable contract. He has no prescriptive right. His case has to be that the defendants are estopped by their conduct from denying him a right of access over their land to the public highway. If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well settled law that the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity? ... Such therefore I believe to be the nature of the inquiry that the courts have to conduct in a case of this sort. In pursuit of that inquiry I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance.

A search for authorities shows that equity does not even have to depend on agreement, for words or conduct can suffice to raise an equity.

In *Ramsden* v *Dyson*,[11] Lord Kingsdown spoke of a verbal agreement 'or what amounts to the same thing, an expectation, created or encouraged.' Similarly, in *Birmingham and District Land Co* v *London and North Western Railway*[12] Cotton LJ said that:

> what passed did not make a new agreement, but in my opinion, what took place between Mr Boulton's agent (need not on every occasion refer to the trustees) and the plaintiffs would have prevented Mr Boulton from bringing ejectment or taking possession of the land as soon as the term of years limited by the agreements respectively came to an end, it raised an equity against him...

And so too, in *Plimmer* v *Wellington Corporation*,[13] the Privy Council said that:

> ... the court must look to the circumstances in each case to decide in what way the equity can be satisfied.

In recent times, we see the same principle being applied. My choice of some of these cases is as follows:

In *Inwards* v *Baker*,[14] the owner of land told his son that he could build on it and then live there; in particular, he had said, 'Why not put the bungalow on my land and make the bungalow a little bigger.' The son who had an expectation 'of being allowed to stay there' but not that the land was his, did just that, spending money on building and remaining in occupation for the rest of his father's life. The method of protection which the court gave was merely to refuse an action for trespass against the son and to declare that he could remain on the land for as long as he desired to use it as a home.

In *Ives (ER) Investments Ltd* v *High*[15] the plaintiffs were refused an injunction to restrain the defendant from exercising a right of way across the former's land. More

particularly, it was held that that the defendant High and his successors had an equity which could only be satisfied by allowing him to have a right of access over the yard, 'so long as the block of flats has its foundations on his land'. It is noteworthy that in this case the contract concerned was not registered under the Land Charges Act 1925, and was accordingly void against a purchaser of the servient tenement, so reliance had to be placed on further facts giving rise to an estoppel and upon the doctrine of mutual benefit.

An important question which arises for decision concerning this part of the case is: what is the role of equity under the Code?

In *Bhagwan Singh* v *Hock Hin Bros*,[16] I had occasion to consider this question and after referring to cases such as *Abigail* v *Lapin*,[17] *Butler* v *Fairclough*,[18] *Vallipuram Sivaguru* v *PCRM Paluniappa Chetty and Anor*,[19] and *United Malayan Banking Corporation Berhad* v *Goh Tuan Laye & Anor*,[20] I concluded thus:

> Despite the misgiving expressed by Professor Haji Salleh Buang as to the locus standi of equity under the Code, in his well researched and interesting article entitled 'Equity and the National Land Code – Penetrating the Dark Clouds' (1986) 1 MLJ cxxv, it seems to me, that it is too late now, to question the proposition that the English doctrine of equitable estoppel applies and, that as a result, equitable rights or interests in land may arise outside the statutory system of registration of title. In other words, the Torrens system does not prevent the court from doing equity where the rights of third parties have not intervened: *Loke Yew* v *Port Swettenham Rubber Company* (1913) AC 491.

Professor Visu Sinnadurai in his book on the *Sale and Purchase of Real Property in Malaysia* on the question whether equitable principles are applicable under the Code opines (at p 206), – and I agree with him – that 'it is now well settled that they do'. And then touching on the relevant Malaysian cases on the subject, he says this:

> In Malaysia, the uncertainty of the application of equitable principles has resulted in a number of conflicting decisions, but it is submitted that there are now sufficient authorities in favour of the application of equitable principles under the Land Code. In one of the earliest cases dealing with this issue, *Wilkins* v *Kannammal*,[21] Taylor J observed:
>
> 'The Torrens law is a system of conveyancing; it does not abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects.'
>
> Again in *Valliappa* v *Kesarmal*,[22] his Lordship said:
>
> 'Secondly, as to registration, it is perfectly true that some of the earlier local cases suggest that the Torrens law is incompatible with, and excludes, many of the doctrines of equity but these cases cannot be fully supported. I think they failed to distinguish adequately between rights in equity and equitable estates in land.'
>
> The views of Taylor J in *Wilkins* v *Kannammal* were referred to by the Privy Council in the recent case *Oh Hiam & Ors* v *Tham Kong*[23] where their Lordships themselves resorted to equitable principles in dealing with the question of indefeasibility under the Code. Again, Gill FJ in *Karuppiah Chettiar* v *Subramaniam*[24] relied on the observations of Taylor J and said:
>
> 'That such equitable estates and rights are recognized under the Torrens system of registration of titles to land is not open to question.'
>
> Furthermore, the courts in a number of cases in referring to the vendor as a trustee for the purchaser have relied on equitable concepts to arrive at this view.
>
> Again in considering other issues under the Land Code not related to sale and purchase of property there is ample Malaysian authority to establish the application of equitable principles.
>
> It is therefore submitted that it is too late in the day to argue in support of the non-application of equitable principles under the National Land Code. The courts should, in cases not covered by the provisions of the National Land Code, resort to equitable principles which are not inconsistent with the Code. Where, of course, the Code is in conflict with general equitable principles, the Malaysian courts cannot resort to equitable principles to override the provisions of the Code.

And, further down, dealing with the effect of s 6 of the Civil Law Act 1956, which provides:

> Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

he adds this at pp 210 and 211:

> It is further submitted that s 6 of the Civil Law Act was not intended to exclude the application of English equitable principles. To understand fully the scope of the section, it is important to consider the other provisions of the Act. Section 3 of the Act allows the importation of English law to Malaysia whereas s 5 allows the importation of English mercantile law. Both these sections are restricted in their application with the important proviso that English law will only be applicable if there are no local legislations dealing with a particular aspect of law. At the time the Civil Law Act was enacted, there was already in evidence a system of land tenure and conveyance. This was based on customary law, Malay Reservation Enactments and Torrens. Section 6 was therefore enacted so as to restrict the application of English law relating to land tenure and conveyance under the wide powers given under s 3 of the same Act. It was for clarity that s 6 was enacted so as to avoid any problems of wholesale importation of English land tenure under s 3. Otherwise it was feared that conflicts might arise with the local law relating to the same matters. Section 6 does not, nor was it ever intended, to exclude equitable principles if the existing law did not cover a particular point of law or where the justice of the case demanded the application of these principles. Furthermore, it should be noted that s 6 does not expressly exclude the application of equitable principles per se. It only excludes English land tenure and land law. In this connection, the observation of Chang Min Tat J in *Devi* v *Francis*[25] is appropriate:
>
> 'The other objection is based on s 6 of the Civil Law Ordinance 1956 which excludes the application of the law of

England relating to tenure or conveyance or assurance of or succession to any immovable property or any estate right or interest therein. The answer to this objection is that the land law of England is one thing and equity another matter...'

Similarly, Ajaib Singh J in *Woo Yok Wan* v *Loo Pek Chee*[26] said:

'What is precluded by s 6 is the English law relating to tenure or conveyance or assurance of or succession to any immovable property ... but the section does not in any way preclude the application of the English principles relating to equitable interests in land.'

In conclusion it may be said that s 6 does not preclude the application of English equitable principles to determine the status of the vendor and purchaser pending registration. As this particular principle is not covered by any law in Malaysia, the Malaysian courts have to, as they have done in so many cases, apply equitable principles. This they should do confidently so long as the application of equitable principles does not conflict with the provisions of the National Land Code or does not override or affect any right or interest bestowed by the express provisions of the Code.

In *Yong Tong Hong* v *Siew Soon Wah & Ors*,[27] HT Ong CJ speaking for the Federal Court said:

In the instant case it may truly be said that there was, in the minds of the contracting parties, no uncertainty as to the period of tenure. No tenant would willingly pay a large sum of money for a simple monthly tenancy which is terminable at the will of the landlord at any time, or even after the month next following. Hence the parties here had expressly agreed upon a 'permanent' letting. On the faith thereof, the $8,000 was paid and the structural alterations made, doubtless at the appellant's expense, as consideration for his remaining in undisturbed occupation for as long as he pleases, provided rent is paid at the rate stated.

And, further down his Lordship added:

Here it seems to me that no strain will be imposed upon the powers of this court to give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows. Section 221(3)(b) of the National Land Code provides that the maximum term for a lease of a part only of alienated land shall be 30 years. The law permits no longer term and this court should grant the appellant no less.

Although the agreement was not a proper instrument for registration as a lease the authorities are clear that it may be treated as an agreement for a lease. *The validity of contracts relating to alienated land or any interest therein is explicitly declared in s 206(3) of the National Land Code.*
(Emphasis added)

That decision was upheld on appeal to the Privy Council which held that there was an 'equity or equitable estoppel protecting the defendant in his occupation for 30 years'.

In *Bank Negara Indonesia* v *Hoalim*,[28] the Privy Council held that in spite of the fact that the defendant was not a protected tenant under the Rent Acts, he had an equity to remain 'so long as he continued to practise his profession'.

Turning to the appropriate remedies, I shall now state my reasons for holding why the plaintiffs are not entitled to an order for specific performance for the grant of a right of carriageway from lot 48 over lot 39 to the public highway known as the Batu Ferringhi Road as envisaged by cl 11, as I have construed it, and as evidenced by the 1935 Survey Department map (p 49 AB).

Counsel for the plaintiffs had conceded – in my view rightly – that to grant an order for specific performance as aforesaid would occasion great hardship to the defendant company since it would involve the demolition of three dwelling houses in a block of eight link houses standing on the right of the carriageway concerned leading from lot 48 and which have already been sold not to mention problems with the Planning Authority. Moreover, there is plentiful authority for the proposition that hardship, in particular to third parties, may be a ground for refusing an order for specific performance. (See *Thomas* v *Dering*[29] (at pp 747-748); *Hexter* v *Pearce*.[30])

Now, rights arising from proprietary estoppel can be given effect to in various ways; for example, by dismissing a claim for possession against the person relying on the estoppel ('the promisee') as in *Inwards* v *Baker*,[14] by refusing to grant an injunction against him, as in *Ives (ER) Investments Ltd* v *High*,[15] or by making an appropriate declaration of his rights, as in *Crabb* v *Arun District Council*.[10] In other cases, the court has made orders analogous to specific performance by directing the transfer to the promisee of the property or *some interest in the property*. So, for example, in *Duke of Beaufort* v *Patrick*,[31] the successors in title of an owner who had consented to the construction of a canal through his property were ordered to convey the site of the canal to the proprietor of the canal on payment of compensation. Similarly, in *Dillwyn* v *Llewelyn*[32] and *Thomas* v *Thomas*[33] the court ordered the transfer of the land to the donees who, in reliance on imperfect gifts, had spent money on improving the land. In this connection, the case of *Pascoe* v *Turner*[34] also merits reading.

In the circumstances, in the exercise of my discretion, I do not propose to make an order for specific performance of cl 11 to provide for a right of carriageway from lot 48 over lot 39 to the public highway known as the Batu Ferringhi Road, envisaged by cl 11, as I have construed it, and as evidenced by the 1935 Survey Department map (p 49 AB).

However, what I propose to do is to make orders analogous to specific performance by directing the defendant company, subject to certain conditions, to do certain acts with a view to providing a limited access from lot 48 to the public highway, in order to prevent it from being landlocked.

Now, at the hearing, the defendant company had themselves proposed the provision of a right of carriageway consisting of a single metalled access road of about 12 ft wide affording access from lot 48 to the public

highway in accordance with the plan exh D75. It seems to me that this would afford a compromise solution to the problem of access faced by the plaintiffs in so far as lot 48 is concerned without in any way affecting their claim for damages for diminution in value of lot 48 in view of the limited access it will now have as compared to that envisaged by cl 11 as I have construed it.

In these circumstances, having regard to the conduct and relationship of the parties, I find that an equity has arisen in favour of the plaintiffs and, without prejudice to the plaintiffs' claims for damages for diminution in value of lot 48 by reason of the restricted access they will now have as compared to that envisaged by cl 11 of the sale and purchase agreement as I have construed it, the appropriate reliefs to satisfy that equity will be as follows:

(a) against the defendant company, subject to planning permission being obtained (if necessary), a mandatory injunction requiring it to construct, as soon as reasonably possible, a single metalled access road of about 12 ft in width, affording access from lot 48 to the public highway known as Batu Ferringhi Road, in accordance, or substantially in accordance with the plan D75, tendered on its behalf at the trial and complying with local authority specifications;

(b) to give legal effect to this order, I would grant a further mandatory injunction requiring the defendant company or its successors in title, as the case may be, to execute the prescribed Form 17A under s 286(1) of the Code and to present the same for registration, thus creating an easement of way in particular, a right of carriageway within the meaning of s 288(b) of the Code in perpetuity over the existing road on lot 39 (the servient land) defined in the 1935 survey map (p 49 AB) in accordance, or substantially in accordance with the plan exh D75, tendered on its behalf of the trial and so affording access from lot 48 (the dominant land) to the public highway known as the Batu Ferringhi Road, in favour of the plaintiffs and their successors in title, within two months from the date hereof, or in the event of planning permission being required, then within one month from the date of the grant of such permission, failing which the senior assistant registrar of this court to do so;

(c) upon presentation of the duly executed instrument in Form 17A aforesaid, the proper registering authority shall register the same as soon as reasonably possible;

(d) there will also be the following consequential orders:

(i) the defendant company or its successors in title shall forthwith enquire in writing from the relevant authorities if planning permission as aforesaid is required; and, if so, to apply forthwith for the same;

(ii) in the event of planning permission being granted but subject to conditions, the defendant company or its successors in title, as the case may be, shall comply with the same as soon as reasonably possible; and shall be responsible for the payment of all prescribed fees or deposits (if any) in connection therewith;

(iii) the defendant company or its successors in title, as the case may be, shall promptly provide the plaintiffs or their solicitors with copies of all correspondences passing between them and the relevant authorities and also of any application for planning permission;

(iv) in the event of the defendant company or its successors in title, as the case may be, failing to enquire or to apply or to comply with the condition as aforesaid, then the plaintiffs or their successors in title, as the case may be, shall be at liberty to do so, in which case, they shall be entitled to recoup all expenses reasonably incurred in connection therewith and the same shall be recoverable as a debt due from the defendant company or its successors in title to the plaintiffs or their successors in title, as the case may be.

(e) however, in the event of planning permission for the access aforesaid being required and not being forthcoming or in the event of the rights of third parties having intervened or in the event of there being some legal or other impediment to the creation of such easement as aforesaid, then the parties herein shall be at liberty to apply to court to enable me to consider what further or other orders I should make in substitution for or in addition to the orders aforesaid, in which event, perhaps, the damages awarded for diminution in value to lot 48 may have to be reassessed, having regard to the circumstances of the case.

Turning to the claim in so far as lot 55 is concerned, it was submitted on behalf of the defendant company that the plaintiffs could use its own 40 ft wide access road within its own development on lot 39, leading up to the boundary of lot 55 as a means of access from lot 55 to the public highway known as the Batu Ferringhi Road. I can think of no good reason why this should not provide a suitable alternative form of access to that afforded by the existing road appearing in the 1935 survey map (p 49 AB) which in any case is not feasible due to the presence of six houses constructed by the defendant company and already sold.

In these circumstances, having regard to the conduct and relationship of the parties which I have particularised when considering the position of lot 48, I find that an equity has arisen in favour of the plaintiffs and the appropriate reliefs to satisfy it will be to make orders analogous to specific performance as follows:

(a) against the defendant company, a mandatory injunction requiring it or its successors in title to execute the

prescribed Form 17A under s 286(1) of the Code and to present the same for registration thus creating an easement of way, in particular, a right of carriageway within the meaning of s 288(b) of the Code in perpetuity over its 40 ft wide main access road on lot 39 (the servient land) and so affording access from lot 55 (the dominant land) to the public highway known as the Batu Ferringhi Road, in favour of the plaintiffs or their successors in title, within one month from date hereof, failing which the senior assistant registrar of this court to do so provided always that this order does not have the effect of interfering with the rights of third parties which might have intervened;

(b) upon presentation of the duly executed instrument in Form 17A, the proper registering authority shall register the same as soon as reasonably possible;

(c) however, in the event of the rights of third parties having intervened, or if there is some legal or other impediment to the creation of such an easement, then the parties herein shall be at liberty to apply to court to enable me to consider what further or other orders I should make in substitution therefor including, perhaps, an order for the award of damages for diminution in value to lot 55, having regard to the circumstances of the case.

Subject to the special defences of laches, acquiescence, waiver, abandonment and limitation, which I shall consider in the final part of this judgment, the remaining issue which now arises for decision, stated broadly, is what is the measure of damages (if any) to which the plaintiffs are entitled, arising from the defendants' acts of trespass, nuisance and injury to the lands comprised in lots 48 and 55.

(a) *Claim for diminution in value of lot 48*

Counsel for the plaintiffs had submitted that compensation should be awarded on the basis of diminution in value of lot 48, which he says, has suffered a complete destruction of its development potential. Accordingly, relying on P39, the report of Mr K Parampathy, a chartered valuation surveyor, counsel has claimed $741,584.

In the report, P39, Mr Parampathy had stated that as regards lot 48, the loss of its market value had been occasioned by the loss of proper access. In particular he had stated and I quote him:

> The absence of access has resulted in the site becoming landlocked and sterile for all development purposes. The claim for injury will be based on the market value of the subject lot if it were provided with proper access facilities. The provision of such facilities would have permitted the property to be used to the optimum value it inherently enjoyed.

Then turning to the quantum of injury, Mr Parampathy had referred to a letter from one Mr Ong Chin Seng, signed on behalf of the secretary of the Majlis Perbandaran Pulau Pinang ('the MPPP') dated 10 September 1983, being appendix II attached to his report, wherein it was stated that 'it can be assumed that lot 48 could be developed to a density of some 30 units to an acre'. Next, Mr Parampathy had referred to a study of evidence of sales of sites suitable for density zoning for 15 units to the acre which disclosed values of approximately $36 and $40 psf and, in respect of 30 units per acre, a value of $60 psf. On this basis, he arrived at the conclusion that the market value of lot 48, assuming it had not been injured by the activities of the defendants, to be $48 psf. He then went on to add that considering lot 48 was sterile for all development purposes, he attributed to it a present value not exceeding $100,000.

Accordingly, he had concluded that a fair claim for injury to lot 48 was as follows, and I quote him:

Before value:	
Market value of subject property:	
1 r 24.4p – 17,533 sf @ $48 psf	$841,584
After value:	
Market value of subject property – say	$100,000
	$741,584

The first observation I should like to make regarding Mr Parampathy's report is that it is based on (a) the letter signed by Mr Ong Chin Seng on behalf of the secretary of the MPPP dated 10 September 1983 and (b) a study of the prices paid for other lands.

As for the letter, I am afraid its evidentiary value is virtually worthless. It is true that Mr Ong was called as a witness for the plaintiffs but being the chief administrative officer of the council, he would not have possessed the necessary expertise to express an opinion on a technical matter such as the likelihood of the council approving a residential development of 30 units an acre in the area concerned. He did, no doubt, say that he had consulted the chief town planner before writing the letter so that the proper person to have spoken about the matter would have been the chief town planner; yet, when the latter was called, not a single question was put to him on the contents of that letter. As regards the prices paid for other lands referred to in the study, it had not been proved that they strictly bear comparison to lot 48 either as regards area or topography.

The second observation I should like to make regarding Mr Parampathy's report is that it is based on the assumption that lot 48 is now landlocked and sterile for *all* development purposes by reason of loss of proper access. In my opinion, the assumption is not justified. It is true that whereas lot 48 had previously enjoyed access by way of the existing road mentioned in cl 11 which had two branches leading to lot 48 whose combined width

was 30 ft, it will now probably have a 12 ft or so wide access road which the first defendant has said it will provide in accordance with their plan, D75, and in respect of which I have made orders analogous to specific performance but subject to various conditions. This would be suitable to cater for the needs of a dwelling house. To that extent, I find that lot 48 has suffered diminution in value.

Accordingly, I am unable for the reasons stated, to accept Mr Parampathy's opinion as to the diminution in value suffered by lot 48.

Similarly, I am unable to accept the opinion of the defendants' expert valuer, Mr S Gopal Krishnan, 'that there appears to be no valid claim for injurious affection due to lack of access in respect of lot 48'.

I would add, that in any event, I am satisfied that the plaintiffs never had any serious or genuine intention of developing lot 48 much less to a density of 30 units to an acre. The first and second plaintiffs had long before the events which gave rise to this suit emigrated to Perth, Australia, where at least the first plaintiff has since been gainfully occupied.

It is true that the first plaintiff did testify that he had plans for the development of lot 48 and that in this connection he had friends in Kuala Lumpur who were prepared to help financially. He added that for this purpose Dato Lim Cheng Kiat had arranged for sketch plans for an eight-storey building and cabana comprising 20 to 22 units to be drawn up. These plans, he added, showed an access road along the same lines as the existing road appearing in the survey map exh P1 (p 49 AB). However, he said that these plans were not submitted to the relevant authority because of the differences he was having with the defendants relating to the blockage along the existing road and the burial of the family house on lot 48. But, neither Dato Lim nor his friends were called to support the plaintiffs' claims in this regard.

I regret I find this part of the evidence of the first plaintiff to develop lot 48, too vague and insufficient to constitute a basis to support a claim for diminution in value as contended for by his counsel. The probabilities were that the plaintiffs held on to lot 48 as an investment in development value. That development value lay in the site itself and I so find.

Now, those being my findings of fact, what are the principles of law which I should apply to them? In *Livingstone* v *Rawyards Coal Co*[35] Lord Blackburn laying down the broad fundamental principle as to damages said that the measure of damage is (at p 39):

> that sum of money which will put the party who has suffered, in the same position he would have been if he had not sustained the wrong for which he is now getting the compensation or reparation.

In *Munnelly* v *Calcon*,[36] Henchy J said at p 399:

> the particular measure of damages allowed should be objectively chosen by the court as being that of the particular case, to put the plaintiff fairly and reasonably in the position in which he was before the damage occurred, so far as pecuniary awards can do so.

But, what is the measure of damages which the court should award in an unusual case, such as the present, where specific performance of cl 11 of the sale and purchase agreement or, in effect, a mandatory injunction to pull down the three houses which stand on the right of way leading to lot 48 envisaged by that clause, thus preventing the continuance of the trespass, must be refused on grounds of hardship to third parties although a modified form of order analogous to specific performance hereinbefore particularised has been granted.

In my search for authority, I have uncovered two cases which shed light on the problem.

In *Bracewell* v *Appleby*[37] six houses built on an estate formed a cul-de-sac around a private road, each of the six properties comprising part of the road with appropriate grants and reservations of rights of way over the road for the purpose of access to the houses. The defendant, who owned one of the houses and who had acquired a plot of land adjoining its grounds, proceeded to build on the plot a new house, access to which could only be over the private road and the grounds of the defendant's existing house. The plaintiffs, who each owned another of the six houses on the cul-de-sac brought an action claiming a declaration that there was no right of way over the private road for the purpose of gaining access to the new house and seeking an injunction restraining the defendant from using the road to reach the house. The declaration was granted, but the injunction was nevertheless refused because the plaintiffs had delayed proceedings until the building of the new house was at an advanced stage. Graham J accordingly proceeded to award damages in lieu, and took the view that 'the defendant must be liable to pay an amount of damages which in so far as it can be estimated is equivalent to a proper and fair price which would be payable for the acquisition of the right of way in question'. While he accepted that the plaintiffs were reluctant to accommodate the defendant as they did not want an extra house on the cul-de-sac, he thought that, for the purpose of assessing damages, the plaintiffs 'must not be treated as if they were in the extremely powerful bargaining position which an interlocutory injunction would have given them if it had been obtained before the defendant started operations'. The figure to aim at was that which, in negotiation, the plaintiffs would have accepted as adequate to compensate them for the loss of amenity and the increased user of the road, but which at the same time would not be so high as to deter the defendant from building at all. Graham J considered that

the defendant would have been prepared to pay a relatively high proportion of his profit for the right of way needed to achieve the building of the new house in which he wanted to, and now did, live, and he awarded damages based on 40% of that profit.

In *Carr-Saunders* v *Dick McNeil Associates*,[38] the same approach was adopted in awarding damages in lieu of a mandatory injunction although a right to light rather than a right of way was in issue. A sum of £8,000 was awarded by way of general damages although evidence of the amount of profit the defendants would have made from the development of their site was lacking.

There seems no reason in principle why the beneficiary of a positive covenant such as cl 11 of the sale and purchase agreement who cannot obtain specific performance for the grant of a right of way as envisaged in the 1935 survey plan (p 49 AB) but who has obtained a modified form of an order analogous to specific performance as in the present case, should not be entitled to damages assessed on the basis of the amount the defendant company would have been prepared to pay to gain substantial release from the obligation of performing the covenant. If such a measure is available to the beneficiary of a restrictive covenant to whom an injunction has not been granted (as in *Wrotham Park Estates Co* v *Parkside Homes*[39]), it should also be available to the beneficiary of a positive covenant who cannot obtain specific performance as aforesaid.

In the present case, there is no satisfactory evidence of the amount of profit the defendant company would have made from the sale of the three link houses each at a price of about $280,000 which stand on the right of way leading to lot 48 – a situation not unlike that in the *Carr-Saunder's case*.[38] However, there is evidence before me of the general loss of amenity suffered by lot 48 and that loss is obviously substantial for, instead of an access consisting of two branches with a combined width of 30 ft, the plaintiffs will have to be content with a single access 12 ft wide offered by the defendant company at the hearing as evidenced in the plan D75. I propose, therefore, to approach the problem of the assessment of damages on the basis that damages are awarded in lieu of a mandatory injunction to pull down the three houses and not merely in compensation for the loss of the actual legal right of way contemplated by cl 11. As Millet J said, in the *Carr-Saunder's case*[38] at p 931 G to H:

> ... it seems to me obvious that any dominant owner, negotiating with a servient owner for monetary compensation for the loss of light, would take into account the general loss of amenity which his premises would suffer. To that extent, it seems to me that the court is entitled to approach the question on the basis that damages are awarded in lieu of an injunction and not merely in compensation for the loss of the actual legal right. If a mandatory injunction had been granted the building would have been pulled down and the plaintiff would have been restored not only to his direct light, but also to sky visibility, a pleasant view of brickwork and a sloping roof, sunlight and so on.
>
> I have little evidence to guide me, except that £3,000 or thereabouts must be the absolute minimum figure. Doing the best I can and taking account, I hope, of all the considerations that have been pressed upon me by both sides, of the evidence I have heard and, indeed, of my own view, I award general damages of £8,000.

I must interpolate to mention that the plaintiffs are themselves partly to blame for their loss of the access consisting of the two branches with a combined width of 30 ft envisaged by cl 11 of the sale and purchase agreement for had they acted with due speed in pursuing their rights they could have obtained the grant of an easement for such access effected by registration in Form 17A under s 286 of the Code but they did nothing of the sort. Had they taken this elementary precaution they would not have found themselves in the present predicament.

Accordingly, proceeding by the steps indicated by Millet J but always bearing in mind the particular circumstances of this case and that the assessment of damages may sometimes be purely guesswork (per Vaughan Williams LJ in *Chaplin* v *Hicks*[40] at p 792 and at p 795 per Fletcher Moulton LJ quoted with approval by Hamid J (as he then was) in *Fernando* v *Indrarajah*,[41] – a case of trespass to land and encroachment), I would award the plaintiffs $100,000 by way of general damages for diminution in value of lot 48; in particular, for loss of amenity, namely, that instead of an access consisting of two branches with a combined width of 30 ft envisaged in cl 11 of the sale and purchase agreement, they will have to be content with a single access of about 12 ft wide offered by the defendant company at the hearing as evidenced by the plan D75.

(b) *Claim for use and occupation of lot 48*

The next branch of the plaintiffs' claim in so far as lot 48 is concerned, arises out of the allegation that the defendants had been occupying lot 48 for the storage of building materials and as a working platform. The plaintiffs say that the period of such user was from February to November 1981 – a period of some ten months.

Mr Bellotti, the plaintiffs' architect, estimated the rental for use of lot 48 for that period to be about $30,000 for 18 months or in other words, $1,666 pm: see his report P20 para 5. So, for a period of ten months of user, counsel for the plaintiffs contended for an award of, say, $15,000 under this head. On the other hand, counsel for the defendants submitted that the plaintiffs had not suffered the loss of the use of their land since there was no evidence that they had intended to put it to any particular use during the period concerned. In any event, he argued that damages in respect of trespass and/or

nuisance ought to be assessed at $50 pm for the period of ten months, thus amounting to $500 based upon the testimony of Mr Kee Kow, the defendant company's area manager.

In my opinion, counsel for the defendants' submission that the plaintiffs were not entitled to damages for the use made by the defendants of lot 48 simply because there was no evidence that the plaintiffs had intended to put it to any particular use during the period concerned is quite untenable.

In *Penarth Dock Engineering Co* v *Pounds*,[42] the defendants having bought a pontoon or floating dock from the plaintiffs failed to have it removed within a reasonable time from the dock premises of which the plaintiffs were lessees and which were in the course of being closed down by the lessors. In the plaintiffs' action for trespass or breach of contract, Lord Denning MR assessed damages as the benefit obtained by the defendants by having the use of the dock premises after he should have removed the pontoon, although the plaintiffs had lost nothing since the dock premises were of no use to them and their lessors had not required them to pay extra rent.

This case shows that the plaintiff would be entitled to recover more than the market rental value since recovery would be based upon the benefit which the defendant had extracted from the user of the land – a principle based upon quasi-contractual restitution.

In *Martin* v *Porter*,[43] a reasonable rent for the use of passages in a mine, generally called wayleave, had been granted, even though no injury has been done to the land. These damages have been allowed whether the defendant was acting wilfully or innocently. (See *Hilton* v *Woods*[44] and *Jegon* v *Vivian*[45]). In *Whitwham* v *Westminster Brymbo Coal Co*[46] where the defendant had trespassed on the plaintiffs' land by tipping soil from his colliery upon it, it was held that the principle of wayleave cases applied so that the damages were not to be assessed merely by taking the diminution in value of land but to the higher value of the user to which the defendant had put it. Lindley LJ said:

> The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purpose, and that lies at the bottom of what are called the wayleave cases.

I must, in the circumstances, make an award in favour of the plaintiffs in respect of the wrongful user by the defendants of lot 48 in area 17,533 sq ft for the storage of building materials and as a working platform and, for this purpose, assess on the meagre material available, the fair rental for the period of ten months from February to November 1981.

I agree that neither Mr Bellotti nor Mr Kee Kow who testified as to this are really competent to speak about the fair market rental for the use of lot 48 and this may explain the widely divergent opinions they have expressed upon this issue. Accordingly, I find that neither version put forward by these witnesses on this point, is acceptable.

I note, however, that in their report dated 7 November 1985 (exh D83), the defendant company's architects M/s Leung Ching Fan & Partners, disagreeing with Mr Bellotti's opinion on the point as to what would be a fair rental for the use of lot 48, have said that even the monthly rental of a bungalow along Batu Ferringhi let unfurnished would be only around $800 pm which, I would say, is not an unfair estimate. They have added that in the case of lot 48 the only part of the land comprised in it that could be used as a working platform would have been the empty land around the family house situated thereon.

In these circumstances, doing the best I can, I would assess the fair rent for the use by the defendants of lot 48 for storage of building materials and equipment and, as a working platform, at $500 pm for the period of ten months from February to November 1981. This would amount to $5,000 which I award accordingly under this head.

(c) *Claim for destruction of the family house on lot 48*

I next turn to consider what has been described by counsel for the plaintiffs as the alternative claim for loss arising from the destruction of the Templeton family house standing on lot 48. It was said that that destruction was caused by the deliberate deposit of excavated material but the defendants said that deposits were due to rain. However, having listened to the rival versions of the plaintiffs and the defendants on this point, I prefer that of the plaintiffs as being more probable. I believe the testimony of the first plaintiff when he said that the deposits of earth on lot 48 by the defendants had virtually buried the family house and, that upon removal of the deposits, it had been razed to the ground and cleared.

Counsel for the plaintiffs went on to argue, relying on the report of the architect Mr Bellotti, being exh P20 para 5, that the replacement cost of the family house, at the time of the trial, would be $240,000. However, he conceded that in view of the age of the house, compensation should be assessed at $120,000 on the basis of the loss of the house, a point which was recognised by Mr Bellotti himself. As for the testimony of the defendant company's architect Mr Wong Yuen Kee (DW9) (who had testified that the house was incapable of being restored economically even before the fill on lot 48), counsel commented, and I think somewhat cogently, that this testimony was of no value because the witness had not seen the house before the dumping had occurred.

However, there are certain plain facts which cannot be ignored. The first plaintiff had himself admitted that the family house had been vacant since 1960 and that in time, it had been vandalised and that by 1980 it had become a very run-down house. He added that he had not restored or even repaired the house for practical reasons connected with his work and the fact that he lived in Australia. He also said that the last time he saw the house was in 1980, though from a distance.

But then he said that he was prepared to restore the house because it was his family house. I am afraid I would take this part of the first plaintiff's evidence with more than a pinch of salt. In fact, I have no hesitation in finding that given the fact that the house had been virtually abandoned for more than 20 years at the time of the acts of trespass complained of, and the personal circumstances of the first and second plaintiffs, the plaintiffs never had the intention of restoring the house nor would they do so in the event of an award being made by this court on that basis. Had there been a genuine desire to reinstate or even to repair the house on the part of the plaintiffs they would have done so long before. Indeed, the plaintiffs never even engaged a caretaker to look after the house but instead allowed it to go to seed for at least two decades prior to the acts of trespass the subject of this suit.

In *Hole & Son (Sayers Common)* v *Harrisons of Thurnscoe*,[47] the defendant's lorry demolished a terrace of three cottages belonging to the plaintiffs, causing the statutory tenant inhabiting one of the cottages to move out. The plaintiffs had intended to demolish the cottages when the opportunity presented itself and the accident damage together with the departure of the statutory tenant provided the opportunity, so that they had no intention of repairing the cottages. The cost of reinstatement was therefore rightly refused and the plaintiffs' recovery was held restricted to a small sum for repairs to an internal wall and some loss of rent.

In *Taylor (Wholesale)* v *Hepworths*[48] where fire gutted the plaintiffs' billiard hall on a site which they held for its potential redevelopment value and which they had no intention of using as a billiard hall, diminution in value was again rightly held to win out over cost of reinstatement as the appropriate measure of damages. Moreover, even this degree of recovery was eliminated because it was less than the costs of clearing the site for redevelopment, which costs the plaintiffs had been saved. The plaintiffs' entitlement to damages thus comprised only the cost of removal of the debris, of immediately necessary remedial works and of securing the premises against trespassers, together with a sum for damage to trade fixtures and fittings.

I would, in the circumstances, make no award in respect of the family house whether for repairs or reinstatement and, I might add, that in any event, any award under this head would have to be nominal and would be merged under the award for diminution in the value of lot 48 which I have already made.

(d) *Claim for exemplary damages in respect of lot 48*

Finally, as regards lot 48, there is a claim for exemplary damages which should be explained as cases of aggravated damages, that is, as cases of extra compensation to the plaintiff for injury to his feelings and dignity (see para 409 *McGregor on Damages*, 15th Ed).

Rookes v *Barnard*[49] was a case concerning intimidation in industrial relations, in the course of which a question arose whether 'exemplary' damages could be awarded in respect of a flagrant breach of contract. In that case Lord Devlin, with the unanimous approval of all his brethren, reviewed the law and laid down that exemplary damages could only be awarded in three categories of cases. These concerned, first, oppressive action by officers of the Crown; secondly, cases where the defendant 'with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk', and thirdly, where statute expressly authorized exemplary damages.

Lord Devlin also expressed three 'considerations' applicable to all cases of exemplary damages: first, that the plaintiff cannot recover such damages unless he is himself the victim of such 'punishable behaviour'. Secondly, 'exemplary' damages can be used both for and against liberty, and are a punishment without the safeguard of the criminal law, so that the weapon must be used with restraint, and the House might have 'to place some arbitrary limit on such awards' despite the respect due to assessment of damages by juries. Thirdly, the financial means of the parties, though irrelevant to compensatory damages are relevant to exemplary damages.

The fact that exemplary and compensatory damages must thus be presented differently to the jury, Lord Devlin also indicated, did not necessarily mean that the jury must make two separate awards. It should, however, be directed that exemplary damages should only come into play if it regards the amount which it has fixed for compensation as inadequate in the circumstances to punish and deter the defendant and mark its disapproval for his conduct.

In *Cassell & Co* v *Broome*[50] (affirming sub nom *Broome* v *Cassell & Co*[51]), the plaintiff claimed that he was libelled in the book *The Destruction of Convoy PQ 17*, an account of a dramatic naval tragedy of World War II, by its publishers, Cassell (the first defendant) and its author (the second defendant). The alleged libels concerned the performance by the plaintiff, Captain Broome, of his naval duties as commander of that convoy, responsibility for the tragic loss of the convoy being attributed to defects in the plaintiff's conduct and character. The evi-

dence showed that both defendants knew before publication that the passages concerned were false, and, moreover, that they persisted in publishing without correction, despite the fact that the falseness of the statements complained of was more than once drawn to their attention on the printer's proofs by the plaintiff, the Admiralty, and others. The jury assessed the compensatory damages at £15,000, and the exemplary at £25,000.

The main issue on which *Broome* v *Cassell*[51] came to the Court of Appeal was whether the jury was debarred by the law as laid down by the House of Lords in *Rookes* v *Barnard*[49] (per Lord Devlin) in 1964, from awarding the £25,000 'exemplary' damages, over and beyond damages required (including any for the 'aggravated' nature of the defendant's conduct) to compensate the plaintiff. This additional amount of 'exemplary' damages has for its purpose, in the Lord Chancellor's later words in *Cassell* v *Broome*,[50] to 'vindicate the strength of the law and act as a supplement to its strictly penal provisions'. The trial judge in *Broome* v *Cassell*[51] regarded himself as bound by this House of Lords decision in *Rookes* v *Barnard*.[49] The judge instructed the jury that in relation to the instant facts they should only award exemplary damages as a separate item, and only if the case fell within Lord Devlin's second category of calculation of profits against damages. The jury, as already observed, awarded £25,000 on the exemplary head. This, then, came to the Court of Appeal to determine whether the exemplary damages were impermissible or excessive, counsel for both defendants arguing that there was no evidence of 'calculation' (interpreting Lord Devlin's language here in a narrow literal sense).

On the narrow issue, whether the facts fell within Lord Devlin's second category, Lord Denning MR and all members of the Court of Appeal left no doubt that in their view they did; though they treated it as only their secondary ground of decision. Assuming, that is, that Lord Devlin's statement of the law was binding on them (which in their main ground they denied), they would still hold that the facts fell within the second category of exemplary damages permitted by *Rookes* v *Barnard*.[49] The defendants had persisted in uncorrected publication, calculating (as their Lordships said, and as the trial court had said, and also proved to be true) that the profits and royalties from this sensation-creating book, with its uncorrected libellous assertions, would exceed any damages awarded against them. This, they thought (as later did the House of Lords), sufficed to meet Lord Devlin's category; there was no need to show an actual arithmetical calculation with pencil and paper.

This alone, of course, would have sufficed as a ground for dismissing the appeal. And the House later affirmed its decisiveness. The majority called the appellant's attempt to escape Lord Devlin's second category 'a forlorn hope'. They stressed the importance of his 'considerations' for the judge's directions to the jury.

The second common law category laid down by Lord Devlin as justifying an award of exemplary damages has been interpreted by Lord Hailsham in *Broome* v *Cassell*[51] 'as not intended to be exhaustive but illustrative, and is not intended to be limited to the kind of mathematical calculations to be found on a balance sheet'. Indeed, in *Drane* v *Evangelou*,[52] at p 462B, Goff LJ stressed that 'a calculation by the defendant of actual money he hoped to make out of the conduct was not necessary'.

In *Australian Consolidated Press* v *Uren*,[53] Taylor J in his judgment said that he was quite unable to see 'why the law should look with less favour on wrongs committed with a profit-making motive than upon wrongs committed with the utmost degree of malice or vindictively, arrogantly or high-handedly with a contumelious disregard for the plaintiff's rights'.

It may well be that a defendant may be shown to have the necessary profit motive when committing a breach of contract where hitherto the writ of exemplary damages has never been thought to lie: see *Kenny* v *Preen*[54] which concerned a lessee's claim for breach of the covenant of quiet enjoyment.

It is, however, clear that there are three categories of cases where exemplary damages would be justified and these have been spelt out by Lord Devlin in *Rooke's* case though even in those cases it is a matter for the court's discretion whether or not to make such an award: see *Holden* v *Chief Constable of Lancashire*[55] at pp 388D and 389B.

I would add one final observation on the law as regards exemplary damages and it is this: the awarding of exemplary damages is a somewhat makeshift and arbitrary method of preventing a tortfeasor's unjust enrichment: see *McGregor on Damages* (15th Ed) para 423 p 267. It is with the above principles in mind that I turn to consider the claim for exemplary damages with regard to lot 48.

It was submitted by counsel for the plaintiffs that the obstruction of the access to lot 48 was carried out by the defendants concentrating construction work on the houses encroaching on the plaintiffs' access road as evidenced by exhs P2 to P3 and P16A notwithstanding the vehement protests of the plaintiffs. Counsel directed my attention to the following extracts from the testimony of Mr Bellotti at p 83A to C of the notes of evidence:

> Yes, injunction was obtained on 5 February 1982 – and I was asked to see if it was being complied with. I found work was still in progress. I went there on 6 February 1982. Yes, injunction was not being complied with. Work was concentrated on the three end houses which, as I said, had encroached on the existing access road.

DAB p 4 – this is a copy of a letter from me to plaintiffs' solicitors reporting back about results of my inspection on 6 February 1982.

(Defendants' counsel agrees to admission of p 4 DAB and two pictures subject to cross-examination – P16A). These two pictures show work in progress on three end houses. (Photos put in by consent subject to cross-examination P16B).

Counsel further directed my attention to the following extracts from the testimony of the first plaintiff, which he said went to show that the defendant company had been attempting to force the plaintiffs to sell their remaining lands, lots 48, 55 and 56:

I now produce that copy – P2. I posted the original of this letter to Mr Low Yow Chuan by ordinary air mail post. I reminded him of cl 11 – of the sale and purchase agreement of 12 July 1971. Soon after writing this letter, in February 1980, I came over to KL where I met Mr Low Yow Chuan at the Federal Hotel. I raised the matter of development especially about the existing road. He said that as lots still owned by us were so small, he wanted to purchase them – he said something to this effect, 'Why worry, I will buy you out'. I told him the properties were not for sale and that we wanted to keep them for sentimental reasons and also our family house still stood on lot 48, otherwise we would have included those lots in the original sale.

In this context, another passage in the testimony of the first plaintiff which merits citation, reads as follows:

Although I have said before I hesitated commencing proceedings for a number of reasons including the fact that Dato Low Yow Chuan was a millionaire and a friend, and I was living abroad, in the end I was compelled to do so because not only had the defendant company breached cl 11 of the contract of sale and purchase dated 12 July 1981, and buried the family house but I was also told that one day whether I liked it or not I would have to sell out to him. It was in February 1980, at the Federal Hotel meeting, that Dato Low Yow Chuan told me that whether I liked it or not I would have to sell out to him. At that time I thought he was joking but in the light of subsequent events I did not think it was a joke.

On the other hand, counsel for the defendants submitted that in view of the inordinate delay on the part of the plaintiffs in asserting their claim to a right of way and in commencing proceedings and the consequent enormous prejudice (unspecified) to the defendant company, no aggravated damages should be awarded. In particular, it was contended that if the plaintiffs had not slept on their rights and instead, either taken a legal easement or lodged a caveat, the problems which they now faced would not have arisen in the first place. He added that it was not fair to blame the defendant company when there is no evidence to suggest that they knew of cl 11 of the sale and purchase agreement (quoted above) at the time their plans for earthworks on lot 39 were submitted to the council.

I must begin by saying that I have no hesitation in accepting the testimony of the first plaintiff and Mr Bellotti, reproduced above, regarding this part of the case. I find nothing improbable in this aspect of their testimony and I think they stood up well to cross-examination. I am satisfied that Mr Bellotti's letter P16A and the accompanying photos P16B were a true reflection of the state of affairs then prevailing at the site concerned. It it also significant that Dato Low, the managing director of the defendant company and the purchaser named in the sale and purchase agreement never testified in court to rebut the allegation that the plaintiffs were being pressured into selling their remaining lots 48, 55 and 56.

On the other hand, I find the submission of counsel for the defendant that because there was inordinate delay on the part of the plaintiffs in pursuing their claims to a right of way and later in commencing proceedings, the plaintiffs should be denied aggravated damages, quite untenable.

The testimony of the first plaintiff does explain – and I accept that explanation as I see nothing improbable in it – why he delayed in taking action. I have, when reviewing the history of the case, given full particulars of this explanation and referred to the relevant contemporary correspondence. Accordingly, I do not propose to indulge in tedious repetition.

Suffice it to say that the evidence, especially the contemporary correspondence, shows clearly that the plaintiffs resorted to litigation only as a last resort after every attempt at negotiation had failed. The plaintiffs exhibited remarkable patience which is perhaps understandable given the fact that the first and second plaintiffs were already settled in Australia and, the further fact, that they were facing a formidable adversary with considerable resources. I have no doubt that the defendant company was aware of these disadvantage which the plaintiffs faced and took full advantage of it by acting in flagrant disregard of their rights in the manner reflected in the contemporary correspondence reproduced above.

I do not consider that the plaintiffs should be deprived of exemplary damages simply because of the indulgences they had shown the defendant company in delaying the institution of proceedings given the circumstances of the case. In this context, I would add that counsel for the defendants' general submission that the defendants had been prejudiced by the plaintiffs' delay in taking action is without substance. What was the prejudice which the defendant company had suffered? No attempt was made to answer this question.

Similarly, I was somewhat startled to note that counsel for the defendants had the temerity to submit that there was no evidence to suggest that the defendant company knew of cl 11 of the sale and purchase agreement at the time the earthwork plans were submitted to

the local authority when it is remembered that the purchaser under it was none other than Dato Low, the managing director of the defendant company, who as I have said, studiously refrained from giving evidence at the trial. Eventually, the transfer of lot 39 was accepted by the defendant company as nominee of Dato Low and, as to this there was never any dispute. Moreover, the original earthwork plans did provide for the stipulated right of way.

I consider that in the absence of evidence to the contrary, given the circumstances I have mentioned, the irresistible inference is that the defendant company well knew of the sale and purchase agreement and, in particular, of cl 11 thereof, long before their earthwork plans were submitted to the local authority for the development of the Mount Pleasure scheme on lot 39.

I must next consider the specific grounds urged upon me by counsel for the plaintiffs in support of his claim for exemplary damages. In summary, counsel drew my attention to the following facts:

(1) The defendants had notwithstanding the protests of the plaintiffs proceeded to construct nine dwelling houses, three of which stood on the existing road obstructing the access to lot 48, while six of the rest stood on the existing road obstructing the access to lot 55.

(2) At or about the same time, the defendant company had entered into sale and purchase agreements to sell these nine houses, each at a price of some $280,000, no doubt at substantial profits to themselves and in disregard of the plaintiffs' rights. Accordingly, as a direct result of the construction of the nine houses aforesaid, the defendant company made substantial profits whilst the plaintiffs lost their right of way which had been specifically contracted for.

(3) The suppression or deliberate non-disclosure in the development plans submitted by the defendant company to the local authority for the Mount Pleasure scheme on lot 39, of the plaintiffs' right of way as envisaged in cl 11 of the sale and purchase agreement or at all.

(4) The attempts by Dato Low, the managing director of the defendant company, to indirectly pressure the plaintiffs into selling their remaining lots 48 and 55.

(5) Whilst on the one hand, the defendant company was possessed of enormous resources the plaintiffs were of modest means.

And, I would add that notwithstanding protests by the plaintiffs, the defendants in the course of their earth-moving operations, buried the plaintiffs' family house which stood on lot 48 and later razed it to the ground. These events, I would regard as evidence of the increased injury to the plaintiffs' feelings.

And there was also the evidence of the chief town planner Mr Ong Swee Teik to the effect that as a matter of common sense it was the duty of the defendant company, when submitting its lay-out plan D55 to the council, to have disclosed the existence of cl 11. Had there been such disclosure then this was a matter which would have been taken into consideration in deciding whether or not to approve the layout plan. There was thus an element of suppression of a material fact on the part of the defendant company which it never cared to explain satisfactorily or at all.

I note that counsel for the defendants was not able to make any effective reply to the five matters pressed upon me by counsel for the plaintiffs as affording grounds for awarding exemplary damages, perhaps understandably so, for in my opinion there was very considerable substance in them.

I must next ask myself whether upon those five matters, an award of exemplary damages would be justified bearing in mind the second category of cases enunciated by Lord Devlin in *Rookes* v *Barnard*,[49] namely, where the defendant has 'with a cynical disregard for a plaintiff's rights calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk' and not forgetting the three 'considerations' applicable to all cases of exemplary damages expressed by him and which I have detailed above.

Having directed myself as aforesaid, I am completely convinced that the plaintiffs have brought themselves within the principles and the considerations enunciated by Lord Devlin aforesaid. In particular, I am satisfied that the defendants' wrongdoing was committed with a profit-making motive, high-handedly and outrageously, with a contumelious disregard for plaintiffs' rights and that the plaintiffs were victims of the defendants' punishable behaviour. That being the case, I have a discretion as to whether or not to award exemplary damages, which I would exercise in favour of the plaintiffs.

Before I proceed to a consideration of the question, what is the appropriate quantum of exemplary damages I should award, I might mention that in *Broome* v *Cassell & Co*[51] Lord Diplock expressed the opinion (at p 1126 H) that a judge sitting alone should make separate awards for compensatory and exemplary damages.

Various criteria have been applied by the courts in determining the amount of the exemplary award. I need only mention those which I consider relevant to the present case.

In the *Rookes* case,[49] Lord Devlin considered that awards of exemplary damages should be moderate and that the means of the parties was a relevant consideration. Thus a small exemplary award would make no impact on a defendant who is well-off while, conversely, even a moderate award may cripple a poor defendant.

Next, in assessing the quantum of an exemplary award regard may be had to the quantum of the compensatory award (per Lord Devlin in the *Rookes* case at p 1128) and also to the conduct of the parties right down to the time of judgment: see *Praed* v *Graham*.[56] I have accordingly, in considering the appropriate sum to award by way of exemplary damages, kept these considerations in mind.

In all the circumstances, so far as the claims relating to lot 48 are concerned, I would award the plaintiffs a sum of $25,000 by way of exemplary damages against both the defendants which represents a little less than 25% of the compensatory award of $105,000.

I would add, lest I be accused of an oversight, that I did consider the question whether I should discriminate between the defendants so far as the claim for exemplary damages was concerned on the ground that the first defendant was the employer while the second defendant was its contractor. However, I saw no reason to do so, because at the material time, the second defendant was made aware of the plaintiffs' complaints by the various letters from the plaintiffs' solicitors, M/s Gan Teik Chee & Ho, which I have reproduced above and copies of which had been extended to him. Notwithstanding that, the second defendant persisted in the acts of nuisance and trespass concerned.

Claim for damages for diminution in value to lot 55

I must next consider the claim for damages in respect of trespass, nuisance and injury to lot 55.

Counsel for the defendants conceded that the first defendant had been filling lot 55 sometime in August 1981 when the foundation work on it was being carried out but explained that his clients thought that it was the property not of the plaintiffs but of one Mr Lim Kar Bee, a good friend of Dato Low, the managing director of the defendant company.

Now, trespass is normally associated with intentional acts even though committed by mistake; for mistake is no defence: see *Basely* v *Clarkson*.[57] So, subject to any special defences which I shall deal with later, liability is clearly established and the issue therefore resolves itself into the question what is the appropriate sum to award by way of damages.

Counsel for the defendants had argued that no damages are recoverable because the fill is in fact good for the development of lot 55. On the other hand, counsel for the plaintiffs has argued that the fill has caused injurious affection to lot 55, as a result of which, it cannot be developed to its full potential, namely, high-rise development, and on this basis, he is claiming $870,573.

In his report (P39) dated 25 January 1984 Mr K Parampathy, the valuer, called on behalf of the plaintiffs, has with regard to lot 55, said this:

> Consequent to the scheme (the Mount Pleasure development scheme) being carried out, the current position is as follows:
>
> (a) ...
> (b) Lot 55, Section 2, town of Batu Ferringhi, is now altered in its physical shape and content.
>
> The above position raises the following considerations:
>
> (i) ...
> (ii) In respect of lot 55, the loss to its market value considering that its physical character has so changed that it is incapable of being used to its optimum benefit. Our understanding is that at present the property can only be used for low density development ie a bungalow unit, semi-detached unit or related low-rise development.
>
> *Quantum of injury*
>
> The reduction in the market value of the above-mentioned lots will be determined by their estimated market values if the properties were not injured in the manner set out above.
>
> The Majlis Perbandaran, Pulau Pinang vide its reference C 50/1/1 – 10 (ENQ (s) 416/83) dated 10 September 1983, expresses the view that the subject lots could have been developed to a density of some 30 units to the acre. See App II.
>
> In determining the market value of the subject lots we will be guided by the level of values passing on properties enjoying density zoning similar to or close to that of the subject properties.
>
> *Study of comparative values*
>
> Sale evidence of sites suitable for a density zoning of 15 units to the acre reveal values of approximately $36 and $46 psf and in respect of 30 units per acre a value of $60 psf.
>
> Guided by the above levels we adopt $48 psf being the market value of lots 48 and 55 if the sites were not injured by the Mount Pleasure development scheme.
>
> We derive the injured value of the subject lots by the use to which they are now likely to be put consequent to ramifications of the development scheme on lot 39.
>
> ... Lot 55, due to the reasons, stated above, is assessed on the basis of its possible user for a bungalow/semi-detached unit and related low-rise development. We consider a fair value under such circumstances to be in the region of $15 psf.
>
> *Computation of injury*
>
> We compute the injury to the subject lands by the before and the after method of valuation.
>
> The 'before' value will represent the market value of the subject properties if they were unaffected by the adjacent development scheme. The 'after' value will be represented by the value which will rest on the properties consequent to the injury being caused. The difference in their values would represent the fair claim for injury caused.
>
> We derive the said values as follows:
>
> Lot 55
> Before value:
> Market value of subject property:
> 2r 16.9 p .. 26,381 sf @$48 psf .. $1,266,288

After value of subject property 26,381 sf @ $15 psf	..	$ 395,715
		$ 870,573
Say	..	$ 871,000

My criticisms of Mr Parampathy's report which appear under my 'first observation' when considering the plaintiffs' claims for diminution in value in relation to lot 48 [see p 225 ante] would apply with equal force to their claims in relation to lot 55 and I would now pray in aid those criticisms. I regret, therefore, that I am unable to accept Mr Parampathy's opinion as regards the diminution in value of lot 55.

Again, I must repeat what I said when considering the plaintiffs' claim as regards lot 48, namely, that I am not satisfied that the plaintiffs had any genuine or sincere intention of developing lot 55 much less to a density of 30 units an acre. I have already said that the first plaintiff had long before the events which gave rise to this suit emigrated to Perth where he has since been gainfully occupied in the export and import field. Similarly, the second plaintiff has also emigrated to Perth and neither the second nor the third plaintiffs, who are the first plaintiff's sisters, gave evidence.

It is true that the first plaintiff testified that in April 1981 he flew out to Penang and consulted Dato Lim Chong Keat to draw up plans for the development of lot 55 with a view to going into a joint venture with his neighbour Mr Lim Kar Bee. Accordingly, the first plaintiff said that it was at this time that he made a site inspection accompanied by Dato Lim and Dato Salleh and noticed that the family house which stood on lot 48 was being buried. Acting on the advice of Dato Lim to take legal action, he engaged his solicitors M/s Gan Teik Chee & Co. However, neither Dato Lim nor Mr Lim Kar Bee were called to testify in support of the plaintiff's testimony nor any reason given for this omission.

I regret I consider this evidence of the first plaintiff of his intention to go into a joint venture with Mr Lim Kar Bee too vague and insufficient to constitute a basis to support a claim for diminution in value as contended for by his counsel. As in the case of lot 48, I find that the probabilities are that the plaintiffs held on to lot 55 as an investment which might over the years yield capital appreciation by way of increase in development value. That development value lay in the site itself and I so find.

But, is there evidence of diminution in value to lot 55 as a result of the defendants' acts of trespass not only by having constructed no less than six houses on the existing road leading to lot 55, thus obstructing access thereto, but also by the defendants' acts of trespass in using lot 55 as a dumping ground and also as a working platform for the construction of their 20-storey condominium on lot 39?

There are two branches to this part of the plaintiffs' claims: first, the claim for obstruction of access, and, secondly, the claim for trespass.

I shall take first, the claim for obstruction of access. So far as the problem of lack of access from lot 55 to the public highway is concerned, I consider that this has been adequately met, at any rate, for the time being, by the orders analogous to specific performance, in particular, the mandatory injunctive relief hereinbefore mentioned which, hopefully, will secure for the plaintiffs a right of carriageway in perpetuity over the defendant company's 40 ft wide main access road on lot 39. If so, I fail to see how any damages could be awarded on account of lot 55 being landlocked. Accordingly, I decline to make any award of damages under this head.

But, on the other hand, if the rights of third parties have intervened, or if there is some legal or other impediment to the creation of a right of carriageway as aforesaid, then, the parties shall be at liberty to apply to court to enable me to consider what further or other orders I should make in substitution therefor, including, perhaps, an order for the award of damages for diminution in value to lot 55, having regard to the circumstances.

I shall next take the claim for trespass by using lot 55 as a dumping ground and also as a working platform. The plaintiffs contend that the effect of the dumping of debris by the defendants on lot 55 during earthworks on lot 39 has been twofold:

(i) there are now rocks and boulders on lot 55 which will cause problems when piling work is carried out and
(ii) there is serious erosion on lot 55 and the fill along the common boundary between lots 55 and 53-54 which must be contained by a retaining wall — not by turfing and terracing which is a cheap though not foolproof method of arresting the problem.

The defendant company's answer is that the rocks on lot 55 are small and will not impede piling. However, it admits that there are very few large rocks or boulders on lot 55 but that these can be dug out if they obstruct piling. Also, the defendant company says that there is no serious problem of soil erosion and the fill can be contained by a retaining wall, turfing and terracing. In any event, it was contended that the plaintiffs would have to carry out these works if they intend to develop lot 55 as they claim.

It will be recalled that in a letter of complaint dated 26 January 1983 exh P9 (reproduced above) the first plaintiff had written to the Pengarah Kejuruteraan, Majlis Perbandaran, Pulau Pinang, setting out his grievances, inter alia, with regard to lots 48 and 55.

That complaint had led to a site inspection on 8 February 1983, at which the City Council engineer Mr

Khoo Say Boon, the defendant company's resident engineer Mr Tan, its site supervisor Mr Chew and the representative from Jayausaha Konsultant Sdn Bhd, were present.

And, following that site inspection, it will also be recalled that a letter dated 10 February 1983 from the City Council engineer Mr Khoo, addressed to the defendant company (exh P10(T)) (reproduced above) with copies to the defendant company's architect and the first plaintiff, was duly sent. As I said, when discussing the issue of liability in tort, I accept the letter of Mr Khoo aforesaid as a true reflection of the condition of the site on 8 February 1983 and the events of that day there, bearing in mind, particularly, that there was no denial in writing of the contents thereof either by the defendant company or its architects. I therefore reject as false and untrue the evidence of the defendant company's site engineer Mr Tan Kiat Hooi that:

> We denied using lot 55 as a means of access to our condo block or as a place for storage of our materials.

Furthermore, in evidence-in-chief, the City Council engineer Mr Khoo, who I regarded as a witness of truth had said, inter alia, this:

> Q: Why was it necessary for you to request them to construct their own access to lot 55?
> A: Because of para 2 p 2 of P9 (Mr Templeton's complaint) which reads:
>
> 'Low Yat Holdings has been using this lot 55 in addition as dumping ground, as a place to produce cement bricks, storing sewage pipes and using as an access and platform for the construction of this 20-storey condominium. The construction of this 20-storey tower block has reached 12 storeys and yet Low Yat Holdings has not even constructed his own access.'
>
> I felt that this paragraph was justified. I came to this conclusion as a result of my inspection of the site.

I also accept the evidence of Mr Bellotti that as a result of the defendants' earthmoving operations there was not filling but dumping on lot 55. Indeed, support for this part of the plaintiffs' claim may be found in the testimony of Mr Kee Kow, the defendant company's area manager, who admitted that the rocks shown in the pictures P51A to C and P52 (of lot 55) 'are pieces of blasted rock on lot 55' (p 231 D, notes of evidence). This witness further admitted that:

> the erosion shown in these pictures is because there is no proper drainage on site. Yes, this erosion can easily be stopped by providing adequate drainage on lot 55.
>
> *Had we been given a chance we would have carried out draining, turfing and levelling works.*
> (Emphasis supplied).

It follows, therefore, that I must reject the opinion of the defendants' valuation expert Mr S Gopal Krishnan (DW8) in his report exh D80 p 17 that:

> whatever injury might have been cause to the land would be offset by the betterment and therefore lot 55 is not injuriously affected.

Upon the above evidence, I have no hesitation in holding that the plaintiffs are clearly entitled to a mandatory injunction requiring the defendants to forthwith remove (as indicated by the plaintiffs) all material, debris and spoil that have been dumped on lot 55 and generally to restore it to its natural state to the satisfaction of the City Council engineer. For the avoidance of doubt, the defendants must carry out all necessary drainage, turfing and levelling works to protect lot 55 from soil erosion and reinstate all boundary stones that may have been dislodged to the satisfaction of the City Council engineer. There will, therefore, be orders by way of mandatory injunctions directed at both the defendants accordingly. Upon compliance with these orders, I fail to see what damage the plaintiffs would have suffered for diminution in value to lot 55 and so I am in no position to make any award for damages under this head.

Claim for construction of boundary wall to protect lot 55

The more difficult question is whether the defendants should be required to construct a boundary wall wherever necessary to protect lot 55 from soil erosion as contended for by the plaintiffs.

Counsel for the plaintiffs has contended for an award of $210,000 being the cost of constructing a retaining wall. He has relied for this purpose upon the testimony of Mr Bellotti that the estimated cost of a 12 ft high retaining wall for the required length of 420 ft would be $500 per ft.

Mr Bellotti was, of course, neither an engineer nor a quantity surveyor so that his evidence as to the need for a retaining wall and as to costing must be viewed with reservation.

However, Mr Lim Seng Hoe (DW5), the consultant engineer to the defendant company, conceded that:

> if a retaining wall is necessary, say if it is proposed to build a six to seven storey building, then I would recommend a rubble retaining wall ten feet high since the fill is between ten and fifteen feet. A further eight feet to ten feet beyond that could be filled.

There is, however, no evidence that the plaintiffs proposed to build a six to seven storey building on lot 55 and certainly the defendants could not have foreseen such an eventuality. However, Mr Bellotti had testified that he had seen sketches prepared in respect of proposed buildings to be built on lot 55; they were three-storey town houses and it had not been determined if piling was required.

As I have already observed when considering the plaintiffs' claims in relation to lot 48, I do not consider that the plaintiffs had a genuine or sincere intention to

develop lot 55 given their circumstances; their intention being probably to merely hold on to lot 55 as an investment which might over the years yield capital appreciation by way of increase in development value, such value lying in the site itself. Any thoughts the plaintiffs might have had of embarking on a joint venture to develop lot 55 must have been of a vague and tentative nature.

In these circumstances, I am unable to entertain a claim for the cost of a retaining wall. I regard it as lacking in proof and therefore speculative. I can therefore make no award or other order in regard thereto.

Claim for use and occupation of lot 55

The next branch of the plaintiffs' claims concerned the use made by the defendants of lot 55 for the storage of building materials, a working platform and a rear access.

There was cogent evidence from the lips of the City Council engineer Mr Khoo Say Boon, an independent witness, establishing these averments, which I unhesitatingly accept. In this connection, I also accept Mr Bellotti's evidence and, therefore, rejected Mr Kee Kow's denial, that the defendant company was using lot 55 as a storage place for their building materials. These acts of trespass persisted notwithstanding the vehement protests of the plaintiffs as evidenced by the first plaintiff's letter of complaint to the City Council engineer, the testimony of the first plaintiff himself, and the contemporary correspondence of his solicitors, M/s Gan Teik Chee & Ho, previously reproduced.

Counsel for the defendants accepts that his clients had been using lot 55 as an access and working platform for their development works on the condominium site on lot 39, at most, from August 1981 until March 1983 – a period of 20 months – when a wall and timber fence were constructed by them. Accordingly, he argued that the measure of damages should be based on the rental for the use of lot 55 which he suggested was $50 pm having regard to the testimony of Mr Kee Kow the area manager. On the other hand, counsel for the plaintiffs contended for a rental at the rate of $1,500 pm or, in other words, $30,000 for the period of 20 months.

In the first place, I find that the period during which the defendants used lot 55 for the purposes mentioned was 20 months ending in March 1983 when a wall and timber fence were constructed by them to prevent further encroachment into lot 55 following persistent objections by the plaintiffs and the granting of an injunction.

Secondly, as to the quantum of the rental I find that the sum suggested by counsel for the defendants is manifestly inadequate whilst that contended for by counsel for the plaintiffs is inordinately high.

It will be recalled that I had, in assessing a similar claim, in relation to lot 48, awarded the plaintiffs a sum of $500 pm for use and occupation. Lot 55 is, of course, substantially larger, being in area 26,381 sq ft as compared to lot 48, which is a mere 17,533 sq ft in area and which also had standing on it the plaintiffs' family house. In the circumstances, I would award the plaintiffs a sum of $600 pm for the use and occupation of lot 55; this means that for the period of 20 months of user aforesaid, the plaintiffs would be entitled to $12,000 and I so order.

Claim for exemplary damages in respect of lot 55

Again, as in the case of lot 48, there is also a claim for exemplary damages, for the defendants' acts of trespass to lot 55.

For the same reasons I gave in allowing the plaintiffs' claim for exemplary damages for trespass and nuisance to lot 48, I would allow the same claim in regard to lot 55. It would be tedious and unnecessary to repeat those reasons and I need no more than say that I adopt them with the necessary modifications and would add the general observation that the evidence of persistent trespass notwithstanding vehement protests by the plaintiffs was equally overwhelming.

As for lot 55, the profits which the defendant company would have gained from the sale of the six houses which stood on the existing access to lot 55, at a price of about $280,000 per house, cannot be disregarded. I do not think that it would be unreasonable to estimate these profits at about 20% of the purchase price.

There is also the evidence of Mr Bellotti that it was his belief that by using lot 55 to gain access to their condominium site on lot 39 the defendant company had saved 18 months. He further testified and I quote him:

> My estimate about the defendant company having saved 18 months was based on my inspection of site, rate of progress of work by contractors, the number of workers on site and topographical conditions. Yes, for these reasons I estimate the defendant company would have taken 18 months to construct their own access.
>
> Yes, I did see the defendants' workers working on defendants' own access. I first saw this in June 1981. Thereafter I also saw this but work was not continuous – it was sporadic.

On the other hand, Mr Lim Seng Hoe (DW5), the defendant company's consultant engineer, said that only one month, if at all, was thus gained by the defendant company. But, Mr Tan Kiat Hooi (DW2), the defendant company's resident engineer, accepted that their access could have been completed from scratch in over two months.

I consider that Mr Bellotti's estimate of the time saved by the defendants is an exaggeration bearing in mind that it has no firm basis. However, I would regard the estimate of Mr Lim as perhaps, understandably, an understatement.

But, having said that, I have no doubt that the defendant company must have saved several months as a result of using lot 55 as an access to their condominium block on lot 39. Doing the best I can, on the meagre material available, I do not think it would be unreasonable to say that the defendants saved at least two to three months at the expense of the plaintiffs' rights.

It will be seen, therefore, that the acts of trespass committed by the defendants to lot 55 were in fact far more serious than those to lot 48 when judged from the point of view of the financial gain made by the defendants at the expense of the plaintiffs and the conduct of the defendants generally. In the case of lot 48, I awarded $25,000 by way of exemplary damages. Having regard to the principles and considerations enunciated by Lord Devlin in *Rookes* v *Barnard*,[49] and the particular circumstances of the case, I consider that $50,000 by way of exemplary damages in the case of lot 55, would not be unreasonable and I so order. That disposes of all the plaintiffs' claims.

I must next consider the special defences of laches, acquiescence, abandonment, waiver and limitation advanced on behalf of the defendants.

I shall take, first of all, the defences of laches, acquiescence, abandonment and waiver, which will be discussed together, as they are closely related and there is a certain degree of overlapping.

I shall begin by defining each of these defences and then proceed to an examination of the legal position having regard to the particular circumstances of the present case. Lastly, I shall deal with the defence of limitation in like manner.

Laches

Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one's eyes open'.

Now, can lapse of time and delay, however gross, in a suit seeking final, as opposed to interlocutory relief, of itself amount to the equitable defence of laches. It is clear that delay in some circumstances can amount to evidence from which the inference can be drawn that the plaintiff has released (or waived, there seems to be no difference) the claims which he asserts: lapse of time always gives rise to a presumption that a stale suit is ill-founded; for a reasonable man is not likely to sleep on his claims if they are well-founded. Whether it does or does not is a question of fact in each case.

It is possible to point to a number of cases in which plaintiffs have been successful in spite of spectacular delays. In England, in *Burroughes* v *Abbott*,[58] rectification of an instrument was granted after a delay of 12 years; in *Weld* v *Petrie*[59] the Court of Appeal held that a mortgagor's redemption suit was not barred by a delay of 26 years and in *Pickering* v *Lord Stamford*,[60] it was held that after a delay of 35 years, a portion of a testator's residuary estate which had been devoted by ten trustees of the testator's will to charity was really held by them on trust for the testator's next of kin. In Australia, a decree of specific performance was granted by the High Court in *Fitzgerald* v *Masters*,[61] 26 years after the cause of action arose and in *Bester* v *Perpetual Trustee & Co Ltd*,[62] Street J rejected a defence of laches where a plaintiff waited 20 years before commencing a suit to rescind a transaction on grounds of undue influence. There are many cases which indicate that mere delay is not a defence in equity. In 1795, in *Pickering* v *Lord Stamford*[60] Arden MR inclined to the view that delay in a situation where no statute of limitation applied, could have legal effect only if it amounted to a release implied from conduct or was coupled with detriment to the defendant or a third party.

In *Fitzgerald* v *Masters*[61] equitable relief was granted after an inordinate length of time had elapsed. On the point under discussion, Dixon CJ and Fullager J at p 443 held that there were no circumstances apart from delay for refusing relief, thereby (and in my opinion, correctly) holding that mere delay of itself cannot constitute laches. In *Fullwood* v *Fullwood*[63] Fry J held that mere lapse of time affords no bar in equity.

My research into the authorities on the subject leads me to the conclusion that there are no fixed rules or principles on which the court acts and each case is considered on its merits and particular facts. In the case of *Re Jarvis*[64] Upjohn J said at p 341:

> I have been referred to a number of textbooks and authorities on this question of laches, acquiescence and delay, but I forbear from referring to them, for in this realm of law each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist.

In this context, the case of *Lindsay Petroleum Co* v *Hurd and Ors*[65] merits reading.

The defence of laches is only allowed where there is no statutory bar: 14 *Halsbury's Laws of England* (3rd Ed) para 1181.

Section 37 of the Limitation Act 1953 (Rev 1981), provides that 'nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.'

Acquiescence

The term 'acquiescence', like the term 'laches', is confusingly used in different senses. Three should be referred to: (a) it can refer to the type of estoppel of which *Ramsden* v *Dyson*[11] is an example. It is this meaning which Lord Cottenham LC in *Duke of Leeds* v *Earl of Amherst*[66] said was the primary meaning of the term. Poole J in *Glasson* v *Fuller*[67] thought likewise; (b) it can refer to an element in one of the two kinds of laches, viz the action of a plaintiff over a long period of time, with full knowledge of his rights, refraining from exercising his rights in circumstances where it can properly be inferred that he has abandoned them. This is waiver, affirmation, release. This is the sense in which Hanbury uses the term when he says: 'The chief element in laches is acquiescence'; (c) finally, as is evident from the question of Lord Wensleydale's speech in *Archbold* v *Scully*[68] the term 'acquiescence' can be used as referable only to the second type of laches considered in this chapter, ie the type of laches which involves prejudice to the defendant or to third parties.

Sir Samuel Griffith alluded to these different senses in *Cashman* v *7 North Golden Gate Mining Co*[69] where he said (at pp 153-154):

> The term acquiescence is not a term of art. It was used in courts of equity as a term to characterize a defence which may be set up by a person against whom another makes a claim for equitable relief. It is a well-known doctrine of equity that when a person claiming equitable relief has lain for a long time and so conducted himself that it would be inequitable to permit him to complain of the defendant's actions, the court will refuse to grant the relief. The term also bears another meaning. It may be fairly applied to a man who, seeing an act about to be done to his prejudice, stands by and does not object to it. He may be very properly said to be acquiescing in that act being done. But the difference in point of law in the legal consequences of the two kinds of acquiescence is quite clear. A man who stands by and sees an act about to be done which will be injurious to himself, and makes no objection, cannot complain of that act as a wrong at all. He never has any right of action, because he stands by and allows the act to be done. Acquiescence in the other sense is a defence to an action for specific relief, on the ground that the plaintiff cannot be reinstated in his original position without doing injustice to the defendant, but it is not an answer to a cause of action already accrued.

In *Glasson* v *Fuller*,[67] Poole J also alluded to the different meanings of the term when he said:

> 'Acquiescence' is used in two senses. If one stands by while he sees the violation of his right in progress, and takes no steps to intervene, he is said to acquiesce in the violation, and he may be thereby debarred from his remedy in respect of it. This is acquiescence in the true sense, but its effect has nothing to do with the lapse of time, and it has no relation to laches. In another sense, acquiescence is used to denote that some equitable right of A has been violated, as where he has been induced to make a gift by undue influence, or where there is a cestui que trust, and his trustee has purchased the trust property, and that after the influence has ceased or the violation has been brought to his knowledge he assents to the continuance of the state of affairs resulting from the violation, to the retention of the gift by the donee, or of the property by the trustee. The lapse of time without proceedings being taken by A is evidence of such assent, and upon acquiescence of this latter kind the doctrine of laches is based. Acquiescence in the strict sense implies either that the party acquiescing has abandoned his right, or that he is estopped from asserting it. Acquiescence in this sense is no more than an instance of estoppel by words or conduct. Laches, acquiescence in the second sense, is no defence if there is a Statute of Limitation in operation, unless it exceeds the period allowed by the Statute.

Abandonment

It is true that even where a right of way has been acquired by express grant it may be abandoned (See *Swan* v *Sinclair*[70]). However, mere non-user is neither a release nor an abandonment; for abandonment of an easement can only be treated as taking place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else. (See *Tehidy Minerals Ltd* v *Norman & Ors*[71] (at p 553).)

In pleading an abandonment, therefore, both the fact of non-user for some definite period and facts showing that the non-user implies release or abandonment of the right should be alleged (See generally 14 *Halsbury's Laws of England* (4th Ed) paras 127-130).

Waiver

Sir Alexander Turner in *Estoppel by Representation* (3rd Ed) pp 319-20 takes the view that waiver is not capable of exact definition. In *Sargent* v *ASL Developments Ltd*,[72] at p 655, Mason J repeated Lord Wright's dictum (uttered in *Ross T Smyth* v *TD Bailey and Son*[73] at p 70) that waiver was a vague term used in many senses. The truth of the matter was put by Cardozo J in *Beatty* v *Guggenheim*[74] (at p 381). That learned judge said that: 'Much of the trouble comes from the use of the misleading word 'waiver' ... It is made to stand for many things – sometimes for estoppel, sometimes for contract, sometimes for election.' In so speaking Cardozo J was no doubt aware of what had been stated two years before by Ewart in his book *Waiver Distributed* at p 13, namely:

> Commencing with 'waiver', we may say that (if it is anything) it is (it certainly used to be) of unilateral character.

> The possessor of some property throws it away. The effect may be that, someone else is benefited, but 'waiver' has no relation to benefits. A watch is thrown away, and some functionary or finder is so much the richer (if the true owner does not intervene). But the 'waiver' is complete although the watch be never found, although it be flung into the ocean.
>
> Election is 'waiver's' nearest neighbour, for it, too, is unilateral. But in election, the act has a legal effect upon the relationship between two persons, or upon the legal right of some party. 'Waiver' has no such effect. 'Waiver' implies that you have something, and that you are throwing it away. Election, upon the other hand, implies that you have a right to get one of two things, or to occupy one of two positions, by choosing between them. Release comes next in order; but it is bilateral, inasmuch as it requires concurring acceptance by someone else. Estoppel is also bilateral, and depends, not (as in release) merely upon the concurrence of the estoppel asserter, but upon his consequential action.
>
> Contract is the furthest removed from 'waiver' and unilateralism, for it connotes the equal action of the two interested parties. 'Waiver' cannot be all, or like all, of these. If it be identical with any one of them, let us say so, and we shall understand that we have two names for the one thing. And if it be not identical with any one, let us so declare, and ascertain, if we can, whether it has any separate and independent existence.

Now, in granting the plaintiffs the reliefs and remedies hereinbefore mentioned, I had taken into consideration the submission of counsel for the defendants that in view of the alleged delay and inaction on the part of the plaintiffs their claims are barred by laches, acquiescence, abandonment and waiver. In particular, it was argued that the plaintiffs were fully aware that an easement of way had not been created in due form under the Code, and yet they had waited until 1980 when the defendant company had submitted plans for development of lot 39, carried out surveys, commenced earthworks and applied for sub-division, before making their demands for a right of way to lot 48. Furthermore, it was said that plaintiffs had waited until 26 September 1981, before issuing their writ by which time construction work on the defendant company's site had reached an advanced stage and the rights of innocent third parties had intervened; moreover, it was urged that the defendant company's title to lot 39 had by then become indefeasible.

I shall now refer, only in outline, to the plaintiffs' explanation for that delay, as I had done so fully when considering the history of the case. In doing so, some degree of repetition will be inevitable. I would, however, mention by way of reminder, that it was an explanation I had accepted. Now, in the present case, the first plaintiff had explained that it was only in January 1980 that he first came to know of the defendant company's likely repudiation of cl 11 of the sale and purchase agreement as a result of which he flew over from Perth, where he had emigrated and was working, to Kuala Lumpur, sought for and had a meeting with Datuk Low and Mr Chan Peng Fook, then the area manager of the defendant company, who told him that a suitable alternative access to lot 48 would be provided by the defendant company.

Mr Chan, who had served the defendant company for about 11 years, ending on November 1980, and was at the date of trial, a town planner attached to Kelang Jaya Development Co Sdn Bhd, confirmed that a 20 ft backlane had in fact been provided for in the defendant company's initial building plans, partly to serve as a new road for access to neighbouring lots, including the plaintiffs' adjoining lot 48. However, in subsequent lay-out plans, there was substituted for the 20 ft backlane, a mere five ft wide drainage reserve, which incorporated a footpath.

Upon his return to Perth, the first plaintiff wrote the letter dated 1 March 1980, P3, to Dato Low confirming the events of that meeting but received neither a reply nor an acknowledgment.

The first plaintiff then consulted a friend, Dato Salleh Yusoff, who advised that a solicitor's letter be sent to Dato Low. This was duly done when M/s Tunku Zuri & Co sent a letter dated 8 April 1980 (p 39 AB) to the defendant company. But, again there was no response. The solicitors apparently sent reminders but again without result. The solicitors then wrote a letter dated 8 August 1980 to Dato Salleh mentioning that despite several letters being sent to Dato Low no reply had been received and suggested that legal action be threatened. Dato Salleh duly conveyed this to the first plaintiff who was then in Perth, but in the words of the first plaintiff which I acept as true, 'I was then in Australia ... we decided we should take time to consider for the simple reason that Mr Low Yow Chuan being a millionaire as well as a friend perhaps we could reach some sort of understanding and settlement in the future'.

But then, in February 1981 when the first plaintiff received a letter from his sister, the third plaintiff, that work on the defendant company's scheme had commenced, he flew out again to Penang, visited the site and saw that excavated soil was being dumped on lot 48. He then complained about this to one Mr Eng, the defendant company's project manager, and asked that a retaining wall be built similar to the one that was being built to stop the spoilage onto houses adjoining lot 48. Mr Eng assured the first plaintiff that this would be done. Then, to quote the first plaintiff, 'Having had this assurance I felt more comfortable and I returned to Perth ...'.

However, in April 1981, the first plaintiff once again flew to Penang to inspect his properties. He said that on this occasion he was accompanied by Dato Lim Chong Keat to draw up plans for development of lot 55. It was then that the first plaintiff saw that his family house was being buried and decided to take action against the de-

fendants and so he consulted M/s Gan Teik Chee & Ho, advocates and solicitors.

It will be recalled that the first plaintiff had also sought the assistance of M/s Lim Kean Siew & Co, the solicitors who had acted for Dato Low in the matter of the sale and purchase of the five plots of land concerned and they had, as a result, written the letter dated 29 July 1987 addressed to Dato Low (see exh P6 hereinbefore reproduced) imploring him to comply with cl 11 but to no avail. It will also be recalled that Mr Lim Kean Siew had himself given evidence for the plaintiffs confirming the events relevant to this part of the case. So, as a last resort, on 26 September 1981, the plaintiffs commenced the proceedings herein against the defendants after a letter before action was ignored.

In these circumstances, I accept the first plaintiffs' explanation for the delay in commencing proceedings; there is nothing unreasonable about the explanation and it is confirmed by the contemporary correspondence to which I have referred and the testimony of Mr Chan, then the defendant company's area manager and Mr Lim Kean Siew.

Upon the evidence aforesaid and having regard especially to the fact that it was only in April 1981 that construction work began on the basis of a new lay-out plan which, unlike the original plans, made no provision for any roads access to and from the plaintiffs' properties over lot 39, the strenuous objections and attempts at negotiation by the first plaintiff who suffered the disadvantage of residence overseas – which was fully exploited by the defendant company – the relative resources and the conduct of the parties generally, I am not prepared to hold, in view of the authorities cited, that the plaintiffs' claims are barred by laches or acquiescence.

As to abandonment and waiver, that too had not been proved and indeed I am satisfied that the plaintiffs intended neither to abandon nor to waive their rights under cl 11. Accordngly, the defences of laches, acquiescence, abandonment and waiver must fail. I now turn to consider limitation.

Limitation

It was submitted for the defendants that under s 286 of the Code, a grant of easement of way must be created by an instrument in form 17A. Accordingly, cl 11 of the sale and purchase agreement could only operate as an agreement to grant an easement; as such any action to enforce that agreement had, by virtue of s 6(6) of the Limitation Act 1953 (Rev 1981), to be brought within six years from the date from which the cause of action accrued, that is to say, the date of the breach.

It was pointed out that the sale and purchase agreement provided a time span for completion; in particular cl 10 provided that if the plaintiffs, as trustees of the will trusts of their father TV Templeton, failed to obtain a court order to sell the property or to rectify the defect in title to holding 64(1) (lot 39) within six months, the agreement was to become null and void. In the event, however, the transfer was executed pursuant to the sale and purchase agreement and was registered on 29 September 1971.

Accordingly, it was submitted that the plaintiffs had six months from the date of the sale and purchase agreement to register their easement of way in Form 17A; that is to say, until 12 January 1972 and, from that date, a further period of six years; that is to say until 12 January 1978, to commence proceedings for specific performance: s 6(6) of the Limitation Act. As in this case, the plaintiffs had commenced proceedings only on 26 September 1981, their action was statute-barred – so it was argued.

On the other hand, it was submitted for the plaintiffs, and I agree, that cl 11 is primarily a restrictive covenant, taken by the plaintiffs, for the benefit of the lots (48, 55 and 56) retained by them and other neighbouring lots, intended to be binding on the purchaser not to obstruct access to and from those lots to the public highway known as the Batu Ferringhi Road, an amenity which they had enjoyed from before. Manifestly, had the purchaser not undertaken to be bound by this restrictive covenant, the sale and purchase transaction would not have gone through.

As Salleh Abas FJ, speaking for the Federal Court, said in *Tam Kam Cheong* v *Stephen Leong Kon Sang & Anor*[75] (at p 39):

> In our judgment, there is no merit to say that only an agreement under seal can constitute a covenant while an agreement under hand cannot. For this purpose it is sufficient to quote 11 *Halsbury's Laws of England* (3rd Ed) para 706 as follows:
>
> 'The word (covenant) will, however, be construed to cover stipulations in an agreement under hand if otherwise it would have no effect as where a document refers to the covenant contained in a lease which is not under seal.'
>
> Further, in Vol 23 of the same edition at para 152, p 75, a restrictive covenant is defined as 'a covenant or agreement ... restrictive of the user of land'. There is therefore no magic in the word 'covenant'.

On a point of construction, his Lordship explained:

> The essence of a negative covenant does not lie in its form but in its substance. A covenant couched in a positive form is but a negative covenant if in substance it is negative. (Cheshire, ibid p 518).

And, when considering the particular clause which called for construction in that case, he said this:

> According to cl 11 of the purchase agreement, the staircase shall be 'open' to use by the respective owners of the floors,

their friends, relatives and visitors and be kept clean and hygienic and maintained by the respective owners. It is thus not open to any owner of the floor to block the staircase.

And, at p 39, his Lordship explained the doctrine of restrictive covenant in these words:

> The doctrine of restrictive covenants founded on *Tulk* v *Moxhay* (1848) 2 Ph 774 as later explained in *Re Nosbet and Pitt's Contract* [1906] 1 Ch 386 is this. The owners of land to which the benefit of a covenant restricting the use of other land (ie burdened land) has been attached may enforce that restriction by injunction against all persons who subsequently own or occupy the burdened land unless they obtain a legal estate for value without notice of the covenant. It is an equitable doctrine formulated by equity judges in order to fill the gap left uncovered by the common law.
>
> At common law, the benefits of covenants, be they positive or negative, which are made with a covenantee who has an interest in the land to which they relate, passes to his successor in title. The burden of such covenants, however, does not run with the covenantor's land. Therefore, his successors in title are not bound to observe the covenants (*Austerberry* v *The Corporation of Oldham* (1885) 2 Ch D 750). It was therefore left to the equity to allow enforcement of the burden of the covenant against the covenantor's successors in title, provided that the following conditions are fulfilled:
>
> (i) The covenant must be negative in nature, ie it must be a covenant to desist from doing a certain thing.
> (ii) The covenantee must retain the land from the protection of which the restrictive covenant is taken and in the case of subsequent assignments the assigned must show that the benefit of the covenant has passed to him.
> (iii) The covenant must touch and concern the land.
> (iv) The covenant must be imposed between vendor and purchaser.
>
> (See Keeton and Sheridan, *Equity* (2nd Ed, 1976) p 336). The doctrine became very popular and applicable mostly in cases where an owner of land selling part of it to a purchaser wishes to protect the unsold part by taking a covenant from his purchaser restricting the mode of use of the sold part.

And, on the question whether the doctrine of restrictive covenant applied to Sabah, he concluded at p 40:

> There is no doubt that by virtue of s 2 of the Application of Laws Ordinance (Cap 6) of Sabah, this doctrine, being an equitable doctrine, is applicable to Sabah.

There would appear to be no difference between the position in Peninsular Malaysia and Sarawak having regard to the applicability of s 6 of the Civil Law Act 1956, to both the territories.

So also, in the present case, I too would construe cl 11 of the sale and purchase agreement as being a covenant, although positive in form, essentially negative in substance; that is to say, that it was intended to protect the plaintiffs' unsold lands (lots 48, 55 & 56) and neighbouring lands by affording them access to and from the public highway known as the Batu Ferringhi Road and, to that extent, restricting the mode of use of the land sold (lot 39). I have already observed, in passing, that the sale and purchase agreement was expressed to be binding upon the heirs, assigns and personal representatives of the vendors and the purchaser respectively.

It is true that the purchaser under the sale and purchase agreement was Dato Low Yow Chuan but he was the managing director of the defendant company and, in fact its alter ego or nominee, so that there was no question but that the defendant company took the transfer with notice of the covenant. In such a situation, subject of course to the discretion of the court, an owner of land to which the benefit of a covenant restricting the use of other land has been attached, may enforce that restriction by injunction against any person who subsequently owns or occupies the burdened land except one who obtains the land for value without notice of the covenant: *Tan Kam Cheong's* case[75] at p 39.

Accordingly, cl 11 does not by itself create an easement of way, an essential requirement of which is registration under s 288 of the Code in Form 17A. But, be that as it may, upon a proper construction, cl 11 is, in my opinion, effective in imposing the restrictive covenant aforesaid upon the purchaser or his assigns. The fact that it might be an implied term of cl 11, having regard to the surrounding circumstances of the case, including the conduct of the parties, that a grant of easement was to be executed in Form 17A, makes no difference to its legal effect.

Having thus established the legal effect of cl 11, it will be readily recognized that each act of obstruction of the existing road evidenced in the 1935 survey plan (p 49 AB) on the part of the defendants would constitute a separate breach, thus giving rise to a fresh cause of action for each day's obstruction. Since the first acts of obstruction occurred in mid-1981, when construction on part of the existing road providing access to lot 48 had begun – see the evidence of Mr Kee Kow (DW1) – and the writ having been issued on 26 September 1981 – no bar by way of limitation arises, assuming the Limitation Act 1953 to be applicable at all.

Similarly, since trespass constituted by placing and leaving objects on the plaintiffs' lands would be continuing wrongs, prospective losses cannot be claimed at law but will ground fresh actions when they occur: *McGregor on Damages* (15th Ed) p 874.

But, counsel for the plaintiffs went further and submitted, and I also agree, that in respect of the intended grant of the easement, the plaintiffs were the purchasers whilst the defendant company, through its alter ego and nominee Dato Low Yow Chuan, was the vendor, the plaintiffs having given full consideration for the grant of an easement by the transfer of lot 39 to the defendant company. Accordingly, the plaintiffs had acquired a beneficial interest in an equitable easement under the doctrine of constructive trust enunciated in *Lysaght* v *Edwards*.[76] In that case, Jessel MR said:

It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.

The Malaysian courts have consistently applied the doctrine enunciated in *Lysaght* v *Edwards*[76] so, for example, in *Temenggong Securities Ltd* v *Registrar of Titles, Johore*,[77] HS Ong FJ speaking for the Federal Court said:

In our view there can be no doubt as to the position in law. As was said by Jessel MR in *Lysaght* v *Edwards*:

'... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.'

I would quote first the headnote to *Williams* v *Greatrex*:

'Held: (3) That the purchaser having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession or that the purchaser had abandoned the contract; and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser. Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years.'

Denning LJ said in that case:

'If he wished to exclude the purchaser, he ought to have taken possession himself. He never did so. I am quite clearly of opinion that, as long as the purchaser remained in possession under a contract which entitled him to be there, he had an equity which the courts will protect. There was no need for him to claim specific performance in order to give him a right to be there. Laches or delay is not a bar to this action.'

In a concurring judgment Hodson LJ (as he then was) cited with approval Cotton LJ in *Mills* v *Haywood* where his Lordship said:

'In such a case, as, eg where the purchaser in possession has no right or titles to such possession except as purchaser, his contract of purchase, and acquiescence in his possession is a recognition by the vendor of this right.'

The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

And, in *Ong Chat Pang* v *Valliappa Chettiar*,[78] Gill FJ said at p 229 col A, B:

In my judgment, the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser. In other words, a purchaser does not get a title in equity until the vendor has done all that is necessary to perfect the purchaser's title. This was brought out quite clearly by Lord Wright in delivering the judgment of the Privy Council in *Abigail* v *Lapin*, a case from Australia ...

In *Temenggong Securities Ltd & Anor* v *Registrar of Titles, Johore & Ors*,[77] the Privy Council referred to the vendor as the trustee of the purchaser. Finally, one of the consequences of the new constructive trust currently being invented by the Court of Appeal in England should be noted. In *Binion* v *Evans*,[79] for example, Lord Denning MR seems to suggest that whenever a promisee's contractual rights over land are threatened by the promisor's assignee (provided he is a volunteer or has notice), the promisee's rights will be protected by a constructive trust – presumably, in some cases, in perpetuity. Lord Denning observed at p 368C to D:

This imposing of a constructive trust is entirely in accord with the precepts of equity. As Cardozo J once put it: 'A constructive trust is the formula through which the conscience of equity finds expression,' see *Beatty* v *Guggenheim Exploration Co* (1919) 225 NY 380, 386; or, as Lord Diplock put it quite recently in *Gissing* v *Gissing* [1971] AC 886, 905, a constructive trust is created 'whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired'.

A similar type of case to *Binions* v *Evans*[79] is *Brikom Investments* v *Carr*.[80] There, tenants were seeking to rely on oral representations given by their landlord to themselves or their assignors to the effect that the landlords would repair the roofs of the tenants' flats without charge. The leases clearly and expressly stipulated that the tenants would pay a maintenance charge and a contribution towards the landlords' expenses in excess of the maintenance charge. In Lord Denning's words:

In all strictness of law neither the tenants nor their assignees have any answer to the claim for contribution. The covenants of the lease are clear. But the tenants and their assignees rely on various representations or promises made by the landlords before and after the leases were executed ...

It was suggested that if assignees are able to rely on an oral or written representation (not contained in the deeds) it would cause chaos and confusion amongst conveyancers. No one buying property would know where he stood.

I am not disturbed by these forebodings. I prefer to see that justice is done; and let the conveyancers look after themselves.

Now, in the present case, the plaintiffs have claimed a declaration that they are entitled to equitable easements in respect of the right of way hereinbefore mentioned. I

would put that claim in this way: the defendant company having obtained a registered transfer of lot 39 from the plaintiffs, the effect of this was that it had been paid in advance for the grant of the easements of way as aforesaid which the defendant company thereafter held as bare or constructive trustee for the plaintiffs. The plaintiffs are, I believe, fortified in this view, by the following passage in the judgment of Oliver J in *Radford* v *De Froberville*[81] (at p 1269):

> ... The plaintiff contracted for the supply of a wall bounding his property as part of the consideration of the transfer and the effect of the transaction was that he transferred his land before the work was done ...

I was satisfied, therefore, that the plaintiffs here were entitled to declarations as to entitlement to equitable easements in respect of the right of way aforesaid, with consequential orders analogous to specific performance, requiring the defendant company to execute the requisite Forms 17A for registration under s 288(b) of the Code for the creation of a right of way, namely, a right of carriageway in perpetuity, to afford access from lots 48 and 55 to the public highway known as the Batu Ferringhi Road, in the manner and subject to the conditions hereinfore particularized.

The defence of limitation fails because s 22(1)(b) of the Limitation Act 1953, provides by way of exception, that no period of limitation prescribed by the Act applies 'to an action by a beneficiary under a trust being an action to recover from the trustee trust property ... in the possession of the trustee or previously received by the trustee and *converted* to his use'. (Emphasis supplied) The defendant company had in this case converted the trust property, ie the equitable easement in respect of the right of way, by building upon it the three houses and the six houses which partly obstruct access to lots 48 and 55 respectively.

In this context, I have not overlooked the submission of counsel for the defendants that the definition of 'land' in the Limitation Act excludes any right of way, easement or right in the nature of an easement. However, s 22(1) of the Limitation Act uses the expression 'trust property' and not 'land', while the Trustee Act 1949 in s 2 provides that 'property includes movable and immovable property, and *any interest in any property*, movable and immovable, and any debt, and any thing in action, *and any other right or interest*, whether in possession or not'. (Emphasis supplied) Clearly, the definition of 'trust property' in the Trustee Act is much wider than the definition of 'land' in the Limitation Act, which no doubt is concerned with actions to recover land under s 9. Indeed, counsel for the defendants had himself acknowledged that the definition of 'trust property' could very well include a right of way: see p 16 of his further written submission. I have no hesitation in holding that it does. In any event, the defendant company having taken the benefit of the transaction concerned, by purchasing the lands concerned, cannot repudiate the burden imposed on it by cl 11 of the sale and purchase agreement and further or alternatively, are estopped from denying that the plaintiffs are entitled to a right of way giving access to lots 48 and 55.

I shall take first the doctrine of mutual benefit. In *Halsall* v *Brizell*,[82] the owners of an estate in 1851 laid it out in 174 building plots and formed roads and sewers, a sea wall, promenade etc and, in disposing of the building plots, they retained the roads, sewers, sea wall and promenade in their own ownership. They entered into a deed with the owners of the various plots providing for the regulation of the estate, one provision of the deed being that each party to it and his successors should pay a just proportion in respect of his plot of land towards the expenses of maintaining the roads, sewers, sea walls and promenade. A question arose a century later as to whether the trustees of the roads, sewers, sea wall and promenade had rightly assessed one of the holders for his contribution. Upjohn J held that the charge was made invalidly but opined that any person who took the benefit of the covenant (ie presumably by purchasing one of the plots) automatically exposed himself to the burden of paying a due proportion of the expenses.

In *Ives (ER) Investments Ltd* v *High*,[15] the dictum of Upjohn J aforesaid was seized upon, in a situation where the owner of Blackacre erected a building with foundations which trespassed to a small extent on Whiteacre. The owners of Blackacre and Whiteacre then orally agreed that Blackacre's trespassing foundations could remain but that Whiteacre should have a right of way over Blackacre. Blackacre passed to purchasers. The question was whether the purchasers were bound by the agreement and the Court of Appeal held that they were. A variety of reasons was given, one of which referred to *Halsall* v *Brizell*[82] to the effect that so long as the owners of Blackacre took the benefit of having foundations which reached into Whiteacre they must shoulder the burden of the right of way over Blackacre. The same principle has been given general effect by Megarry VC in *Tito* v *Waddell (No 2)*.[83]

Another illustration of the principle that a party cannot enjoy the benefits of an arrangement without giving effect to the burden imposed on such benefits is to be found in *Hopgood* v *Brown*[84] (a decision relating to the use of drainage).

Applying the principle enunciated in these cases, I would say that the defendant company having taken the benefit of the transaction by receiving a valid and registrable transfer of the lands concerned from the plaintiffs it cannot now repudiate the burden imposed upon it by cl 11 of providing the right of way stipulated therein and so are bound by the covenant to do so. In other words,

the defendant company had taken the transfer of the lands concerned subject to the condition imposed under cl 11.

As Ong CJ said in *Yong Tong Hong's* case,[27] 'the validity of contracts relating to alienated land or any interest therein is explicitly declared in s 206(3) of the National Land Code' and so there can be no question of the Limitation Act applying.

I must lastly consider whether one can estop oneself out of the Limitation Act. I confess this is a fine point of law which is not free from difficulty. In *Combe* v *Combe*,[85] Denning LJ (as he then was) enunciated the doctrine of promissory estoppel in these terms:

> ... where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him ...

The language of the learned judge would seem apt to deal with a defendant who, it is alleged, has caused a plaintiff to delay proceedings.

Moreover, the so-called equitable proprietary estoppel has been expanded to create a cause of action. In other words, it can be used not just as a shield but also as a sword. I have, when considering the plaintiffs' claim to a declaration as to entitlement to an equitable easement, referred to an array of cases to illustrate the propositions that rights arising from proprietary estoppel can be given effect to in various ways. I have in mind especially the cases where the court has made orders analogous to specific performance by directing the transfer to the promisee of the property or some other interest in the property in question. In particular, I have in mind cases such as *Crabb* v *Arun District Council*,[10] *Duke of Beaufort* v *Patrick*,[31] *Dillwyn* v *Llewelyn*[32] and *Thomas* v *Thomas*[33] which I have already discussed.

Only six years ago, in *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd*[86] Lord Denning emphasized the return to estoppel as a sword when he synthesized the cases and announced that the doctrine of estoppel had become 'overloaded' with cases and that 'the separate developments' of estoppel by representation, promissory and proprietary estoppel could now be seen 'to merge into one general principle shorn of limitations'. That general principle was that where a man by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be 'unjust or inequitable' for him to do so. Lord Denning's actual words will repay reading and they are as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.'

In *Kok Hoong* v *Leong Cheong Kweng Mines Ltd*,[87] a decision of the Privy Council from the then Federal Court of Malaysia, in a case of moneylenders, their Lordships said:

> ... there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not absolutely prohibitory and so do not preclude estoppels. One example of this is the Statute of Frauds (see *Humphries* v *Humphries* (1910) 2 KB 531 CA in which it was no doubt considered that ... the statute ought to be treated as regulating procedure, not as striking at essential validity) ... a more direct test to apply ... is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interest of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise.

These words are widely drawn and suggest that the Limitation Act can give way to estoppel. Indeed, there are dicta in *Turberville* v *West Ham Corporation*[88] which suggest that a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the period have induced the plaintiff to delay proceedings.

And, in *Othman & Anor* v *Mek*,[89] Ong CJ said:

> ... Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see 24 *Halsbury's Laws of England* (3rd Ed) p 181. A right which becomes unenforceable merely by reason of limitation does not ipso facto perish or vanish into thin air: see *Holmes* v *Cowcher* [1970] 1 WLR 835 where it was held that although under s 18(5) of the Limitation Act 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute-barred or not. If, as in that case, equitable rights did not perish by reason of limitation, can this same defence be set up here to deny the rights of a beneficial owner to be granted his claim to the legal title?

So far as may be necessary, I would hold that based on these dicta the Limitation Act is purely procedural: see *Othman and Anor* v *Mek*[89] and cf *Michell* v *Harris Engineering Co Ltd*.[90] And, therefore, in certain circumst-

ances, one can estop oneself out of the Limitation Act by conduct.

Now, what are the circumstances here which could be said to estop the defendant company out of the Limitation Act? I have referred to these circumstances earlier in a different context, when considering proprietary estoppel generally and, for convenience, would summarize them as follows:

(a) the promises made by Dato Low to the plaintiffs during the negotiations for the sale that the sale was expressly conditional upon the provision of the right of way concerned, upon which the plaintiffs relied and without which the transactions would never have gone through: see Dato Low's own solicitors' letter exh P6, reproduced above;
(b) clause 11 of the agreement of sale and purchase – reproduced above.
(c) The original lay-out plans for the development of the Mount Pleasure property submitted by the defendant company which provided for a 20 ft right of way to serve, inter alia, the plaintiffs' lots;
(d) the promises made by Dato Low as managing director of the defendant company to the first plaintiff in early 1980 at the Federal Hotel and at its registered office in Ipoh Road, Kuala Lumpur, to provide a right of way;
(e) it was as late as April 1981 that the defendant company commenced construction work on the basis of a new lay-out plan which, unlike the original lay-out plan, made no provision for any road access from the plaintiffs' lots to the public highway resulting in their being cut off as confirmed in their own solicitors' letter dated 29 July 1981 (exh P6); and
(f) generally, the first plaintiff (who alone shouldered the burden of prosecuting the claim) suffered the disadvantage of residence overseas and faced a potential adversary of infinitely greater resources but, more importantly, there was the conduct of the parties as reflected in the contemporary correspondence reproduced above.

I would conclude this part of the case by applying the approach adopted by Lord Denning in the *Amalgamated Investment and Property* case[86] that when, as here, the defendant company has by its words and conduct led the plaintiffs to believe that they would be provided a right of way from their lots, which otherwise would be landlocked, it should not be allowed to go back on them when it would be unjust or inequitable for it to do so.

If, contrary to my primary view, the defendant could not or did not estop itself out of the Limitation Act, then I would hold that by reason of the promises made by its managing director to the first plaintiff at the meetings held in early 1980 at the Federal Hotel and at its registered office in Ipoh Road to provide for a right of way, it had acknowledged the plaintiffs' right or title to a right of way as claimed. (See, by analogy, the case of *Eddington* v *Clark*.[91]) The writ herein having been issued on 26 September 1981, the action is not barred by limitation.

In summary, therefore, there will be judgment for the plaintiffs as follows:

(1) Against both the defendants, general damages for diminution in value of lot 48 – $100,000.
(2)(a) Against the defendant company, subject to planning permission being obtained (if necessary), a mandatory injunction requiring it to construct, as soon as reasonably possible, a single metalled access road of about 12 ft in width, affording access from lot 48 to the public highway known as Batu Ferringhi Road, in accordance or substantially in accordance with the plan D75, tendered on its behalf at the trial and complying with local authority specifications.
(b) To give legal effect to this order, I would grant a further mandatory injunction requiring the defendant company or its successors in title, as the case may be, to execute the prescribed Form 17A under s 286(1) of the Code and to present the same for registration, thus creating an easement of way in particular, a right of carriageway within the meaning of s 288(b) of the Code in perpetuity over the existing road on lot 39 (the servient land) defined in the 1935 survey map (p 49 exh AB) in accordance or substantially in accordance with the plan exh D75 tendered on its behalf at the trial and so affording access from lot 48 (the dominant land) to the public highway known as the Batu Ferringhi Road, in favour of the plaintiffs and their successors in titles, within two months from date of the decision herein, or in the event of planning permission being required, then within one month from the date of the grant of such permission, failing which the senior assistant registrar of this court to do so.
(c) Upon presentation of the duly executed instrument in Form 17A aforesaid the proper registration authority shall register the same as soon as reasonably possible.
(d) There will also be the following consequential orders:
(i) the defendant company or its successors in title shall forthwith from date of decision herein enquire in writing from the relevant authorities if planning permission as aforesaid is required; and, if so, to apply forthwith for the same;
(ii) in the event of planning permission being granted but subject to conditions, the defendant company or its successors in title, as the case may be, shall comply with the same

as soon as reasonably possible; and shall be responsible for the payment of all prescribed fees or deposits (if any) in connection therewith;

(iii) the defendant company or its successors in title, as the case may be, shall promptly provide the plaintiffs or their solicitors with copies of all correspondences passing between them and the relevant authorities and also of any application for planning permission;

(iv) in the event of the defendant company or its successors in title, as the case may be, failing to enquire or to apply or to comply with any condition as aforesaid, then the plaintiffs or their successors in title, as the case may be, shall be at liberty to do so, in which case, they shall be entitled to recoup all expenses reasonably incurred in connection therewith and the same shall be recoverable as a debt due from the defendant company or its successors in title to the plaintiffs or their successors in title, as the case may be;

(e) However, in the event of planning permission for the access aforesaid being required and not being forthcoming or in the event of the rights of third parties having intervened or in the event of there being some legal or other impediment to the creation of such easement as aforesaid, then the parties shall be at liberty to apply to court to enable me to consider what further or other orders I should make in substitution for or in addition to the orders aforesaid, in which event, perhaps, the damages awarded for diminution in value to lot 48 may have to be reassessed, having regard to the circumstances of the case.

(3) Against both the defendants, special damages, by way of fair rent for their use of lot 48 for the storage of building materials and equipment and as a working platform, at the rate of $500 pm for a period of ten months, that is to say, from February to November 1981 – $5,000.

(4) In respect of the plaintiffs' family house, I make no award since any award under this head would be nominal and would merge under the award for diminution in value of lot 48.

(5) Against both the defendants, exemplary damages, in the sum of $25,000 insofar as the claims in tort relating to lot 48 are concerned.

(6) In respect of the plaintiffs' claims, against both the defendants for general damages for alleged diminution in value of lot 55, I make no award.

(7)(a) Against the defendant company, a mandatory injunction requiring it or its successors in title to execute the prescribed Form 17A under s 286(1) of the Code and to present the same for registration thus creating an easement of way, in particular, a right of carriageway within the meaning of s 288(b) of the Code in perpetuity over its 40 ft wide main access road on lot 39 (the servient land) and so affording access from lot 55 (the dominant land) to the public highway known as the Batu Ferringhi Road, in favour of the plaintiffs or their successors in title, within one month from the date of the decision herein, failing which the senior assistant registrar of this court to do so *provided always* that this order does not have the effect of interfering with the rights of third parties which might have intervened.

(b) Upon presentation of the duly executed instrument in Form 17A, the proper registering authority shall register the same as soon as reasonably possible.

(c) However, in the event of the rights of third parties having intervened, or if there is some legal or other impediment to the creation of such an easement, then the parties shall be at liberty to apply to court to enable me to consider what further or other orders I should make in substitution therefor including, perhaps, an order for the award of damages for diminution in value to lot 55, having regard to the circumstances of the case.

(8)(a) Against both the defendants, a mandatory injunction requiring them to remove forthwith from date of decision herein (as indicated by the plaintiffs) all material, debris and spoil that had been dumped on lot 55, and generally, to restore it to its natural state, to the satisfaction of the City Council engineer, Penang.

(b) For the avoidance of doubt, against both the defendants, a further mandatory injunction requiring them to carry out all necessary drainage, turfing and levelling works to protect lot 55 from soil erosion and reinstate all boundary stones that may have been dislodged, to the satisfaction of the City Council engineer, Penang.

(c) Having regard to the time limits imposed by the provisions of para 2(b) above, the relevant authorities shall reply in writing immediately to the enquiry by the defendant company or its successors in title or by the plaintiffs or their successors in title made pursuant to the provisions of para 2(d)(i) or 2(d)(iv) above, as the case may be, and if planning permission is required, shall process the same and make a decision thereon as soon as reasonably possible.

(9) In so far as the claim for the cost of a retaining wall to protect lot 55 from soil erosion is concerned, I regard it as lacking in proof and therefore speculative. I can therefore make no award or other order in regard thereto.

(10) Against both the defendants, special damages by way of fair rent for their use of lot 55 as a storage place for their building materials and as an access and working platform for their development works on the condominium site on lot 39, at the rate of $600 pm for a period of 20 months, that is to say, from August 1981 to March 1983 – $12,000.

(11) Against both the defendants, exemplary damages, in the sum of $50,000 in so far as the claims in tort relating to lot 55 are concerned.

(12) Against both the defendants, interest at the rate of 6% pa on all compensatory general damages awarded for the period from date of service of the writ until date of judgment under s 11 of the Civil Law Act 1956, and thereafter, at the rate of 8% pa until satisfaction under O 42 r 12 of the Rules of the High Court 1980.

(13) Against both the defendants, interest at the rate of 3% pa on special damages awarded for the period from date of accrual of cause of action until trial.

(14) Against both the defendants, costs of the action on the higher scale to be taxed by the senior assistant registrar of this court in default of agreement by the parties.

(15) Generally, the parties be and are hereby at liberty to apply.

Order accordingly.

Solicitors: *Gan Teik Chee & Ho; Chang & Vello.*

Reported by *Wong Kim Fatt*

Chung Khiaw Bank Ltd v Lau Ah Yen & Anor

HIGH COURT (PENANG) – SUIT NO 31-375-88
WAN ADNAN J
4 MARCH 1989

Land Law – Properties charged as security for loan – Sale of properties by public auction – No bid at auction – Whether court had power to order sale by private treaty – National Land Code 1965, ss 265 & 266(1)

The defendants were registered proprietors of properties which were charged to the plaintiffs as security for a loan. Upon the defendants' breach of provisions of the charge, the plaintiffs applied to the land administrator for an order of sale under the National Land Code. No bid was, however, obtained at the sale. The plaintiffs entered into an agreement with the purchasers for sale of the properties subject to approval of the High Court on the plaintiffs' application. The defendants also applied for leave to enter into a sale and purchase agreement of the properties.

The plaintiffs' application was dismissed in chambers at the plaintiffs' request. At hearings in open court the plaintiffs contended that the court did not have the power to order a sale of the properties by private treaty and therefore that the defendants' application should be dismissed.

Held, dismissing defendants' application:

(1) Sections 256 to 259 and ss 260 to 265 of the National Land Code contemplate a sale by public auction only and the court has no power to order sale by private treaty under any of these sections.

(2) However, pursuant to s 266(1) of the National Land Code the court may allow the properties to be sold by private treaty notwithstanding an order for sale of land by public auction provided it is satisfied that the proceeds of such sale will not be less than the amount due to the plaintiffs under the charge and that the plaintiffs will be duly paid in full out of the said proceeds.

(3) In the present case the defendants' application was to sell the properties at a price which was less than the amount still due to the plaintiffs under the charge.

[*Editorial Note:* The defendants have appealed to the Supreme Court vide Civil Appeal No 02-64-89.]

Cases referred to

1 *The Chartered Bank* v *Packiri Maideen & Anor* [1963] MLJ 276 (distd)
2 *Collector of Land Revenue Kota Bahru* v *Yusoff bin Yunus* [1977] 2 MLJ 53 (folld)

Legislation referred to

Land Code (Cap 138) ss 149 to 154
National Land Code 1965 ss 256, 259(2)(c), 260, 261, 263, 265, 266(1)
Rules of the High Court 1980 O 56 r 2(2)

Charles Rajah and *J Balan* for the purchasers.
Annamalai for the defendants.
Tan Hiang Joo for the plaintiffs in chambers.
Lim Seang Lee (Cik) for the plaintiffs.

Cur Adv Vult

Wan Adnan J: The defendants are the registered proprietors of the properties known as lots no 649 and 650 Mukim Sungei Seluang Daerah Kulim, Kedah held under SPK 4962 and 4963 ('the properties'). On 24 August 1983 they charged the properties in favour of the plaintiffs vide charge presentation no 642/83 Jilid 23 Folio 6 as security for a loan of $350,000. The properties are held under Land Office title. Upon breach by the defendants of the provisions of the charge, the plaintiffs applied to the land administrator Kulim for an order of sale under s 260 of the National Land Code. On 14 March 1987 the said land administrator ordered that the properties be sold by public auction on 8 June 1987. The reserve price was fixed at $200,000. There was no bid at the sale.

On 25 May 1988 the plaintiffs entered into an agreement with Lee Keng Huah and Khor Lye Seng ('the purchasers') whereby the plaintiffs had agreed to sell the